152 U.S. 81

RECORD, CASE No. 14,228.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 225.

SAM. LAZARUS, PLAINTIFF IN ERROR,

vs.

WILLIAM WALTER PHELPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 9, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 1, 1893.

1 *Caption.*

At a term of the circuit court of the United States in and for the fifth circuit and the northern district of Texas, at Dallas—present and presiding, the Honorable A. P. McCormick, United States district judge—and which term convened on the 13th day of January, 1890, and adjourned on the 28th day of February, 1890, the following cause, among others, came on for trial, to wit:

WILLIAM WALTER PHELPS
vs.
SAM. LAZARUS. } No. 1197.

2 THE STATE OF TEXAS, }
County of Dallas. }

In United States Circuit Court for Northern District of Texas.

To the judges of said court:

The petition of William Walter Phelps, who is a citizen of the State of New Jersey, residing in the county of Bergen, in said State, complaining of Sam. Lazarus, who is a citizen of the State of Texas, residing in the county of Grayson, in said State, respectfully represents that on, to wit, the 15th day of April, in the year of our Lord 1887, petitioner owned the fee-simple title to and was in the possession as such owner of the following-described surveys of land—that is to say, certain sections of land, each containing 640 acres, all surveyed by virtue of land certificates issued to the Houston & Great Northern Railroad Co., and more particularly described as the following-numbered surveys in Childress county, State of Texas, to wit: Surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, 99, in block No. 9, and in the same county.

Surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, in block No. 10, and in the same county; surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, in block No. 14, and in the same county.

Surveys numbered 1, 3, 39, 41, 43, 79, 81, and 83, in block No. 18, and in the same county; surveys numbered 1, 3, and 19, in block No. 19.

3 And the following-numbered surveys in Collingsworth county, in the State of Texas, to wit:

Surveys numbered 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 45, 47, 49, 51, 53, 55, 67, 69, 71, 73, 89, and 91, in block No. 10, and in same county.

Surveys numbered 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, *67*, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99, in block No. 14, and in the same county.

Surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, and 37, in block No. 15, and in the same county.

Surveys numbered 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99, in block No. 19, and in the same county.

Surveys numbered 1, 3, 5, 7, 9, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 45, 47, 49, 51, 53, 55, 57, 59, 61, and 43, in block No. 21, and the following-numbered surveys in Donley county, State of Texas, to wit:

Surveys numbered 21, 39, 41, 43, 51, 59, 69, 61, 65, 75, 77, 79, 81, 83, 85, 87, 95, 97, 99, in block No. 20, and in the same county.

Surveys numbered 11, 13, and 37, in block No. 21, and in the county of Hall, in said State.

Surveys numbered 5, 7, 9, 11, 31, 33, 35, 37, 45, 49, 51, 71, 75, 77, 85, 87, 89, and 91, block No. 18, and in the same county.

Surveys numbered 5, 7, 9, 11, 13, 15, 17, in block No. 19, and in the same county.

Surveys numbered 1, 3, and 9, in block No. 20, making a grand total of one hundred and seventy-six thousand acres.

4 That on, to wit, the fifteenth day of April, 1887, the said Sam. Lazarus, without lawful authority and by force and arms, entered upon said land and put thereupon large herds of cattle and horses for the purpose of pasturing them thereon, and from that time until now the cattle and horses of the said Sam. Lazarus have been pastured upon said lands and consumed the grass found growing thereupon, and said Lazarus has during the whole of said time converted to his own use the said land and appropriated to and taken to himself all of its benefits, to the annual damage of petitioner to the amount of fourteen thousand and eighty dollars.

Petitioner charges that the pasturage of said land so appropriated and used by the said Sam. Lazarus during the whole time it has been occupied and used by him has been and is still of the annual value of eight cents for each acre thereof.

The premises considered, petitioner sues and prays that said Sam. Lazarus be cited to appear and answer this petition, and that petitioner have judgment for *its* damages aforesaid at the rate of eight cents per acre for each acre of said land annually from and including said fifteenth day of April, 1887, up to the date of the trial of this cause, and for his costs of suit; and, as in duty —, he will ever pray.

LEAKE & HENRY,
Att'ys for Petitioner.

The foregoing is endorsed as follows, to wit:

No. 1197. William Walter Phelps *vs.* Sam. Lazarus. Plaintiff's original petition. Filed Sept. 17th, 1888. A. J. Houston, clerk.

5 In the United States Circuit Court for the Northern District of Texas, at Dallas.

The President of the United States of America to the marshal of the northern dist. of Texas, Greeting:

You are hereby commanded to summon Sam. Lazarus, a resident citizen of the county of Grayson, if to be found in your district, to be and to appear before the honorable circuit court of the U. S. at the next regular term thereof to be holden for the fifth judicial circuit and northern district of Texas, at the court-room thereof, in the city of Dallas, on the second Monday, it being the 14th day, of January next, to answer the petition in case No. 1197, filed on the 17th day of September, 1888, of Wm. W. Phelps, plaintiff, against Sam. Lazarus, defendant. The nature of the plaintiff's demand is as follows, to wit: Suit to recover the sum of $14,080 as rental on certain sections of land from and including 15th day of April, 1887, said land situated in Childress, Donley and Hall and Collingsworth counties, Texas, and originally located by virtue of certificates issued to Houston & Great Northern Railroad Co. For further statement see certified copy of petition attached to copy of citation, of which you will serve the said Sam. Lazarus; also with the accompanying certified copy of said petition, and with a true copy of this writ.

6 Herein fail not, and due return of this writ make on or before the 14th day of January next, showing how you have executed the same.

Witness the Hon. Samuel F. Miller, senior associate justice of the Supreme Court of the U. S., and the seal of the circuit [SEAL.] court thereof, at Dallas, Texas, this 17th day of September, in the year of our Lord one thousand eight hundred and eighty-eight, and of American Independence the 113th year.

A. J. HOUSTON,
Clerk of said Court.

The foregoing is endorsed as follows, to wit:

No. 1197. U. S. circuit court, northern dist. of Texas, at Dallas. Wm. W. Phelps *vs.* Sam. Lazarus. Original citation to Sam. Lazarus. Grayson Co. Issued on the 17th day of Sept., A. D. 1888. Houston, clerk. Returned and filed on the 7th day of Nov., A. D. 1888. A. J. Houston, clerk, by W. L. McDonald, d'p'y.

Return of Marshal.

Received this writ on the 17th day of Oct., 1888, and I executed the same on the 5th day of Nov., 1888, by delivering to the within-named defendant, Sam. Lazarus, at Gainesville, Tex., in person a certified copy of the petition in this case; also a true copy of this writ.

W. L. CABELL,
U.S. Marshal, N. D. T.,
By A. J. BOLING, *D'p'y.*

7 *Order of Court.*

W. W. PHELPS
versus
SAM. LAZARUS. } No. 1197.

JAN'Y 31ST, 1890.

Ordered by the court that the plaintiff has leave to amend.

8 Suit pending in United States circuit court for the northern district of Texas, holding its sessions at Dallas.

WM. WALTER PHELPS
vs.
SAM. LAZARUS. } # 1197.

Now comes the plaintiff, and, leave being had of the court, amends his original petition filed herein September 17, 1888, and in lieu thereof files this his first amended original petition as follows:

To the judges of said court:

The petition of William Walter Phelps, who is a citizen of the State of New Jersey, residing in the county of Bergen, in said State, complaining of Sam. Lazarus, who is a citizen of the State of Texas, residing in the county of Grayson, in said State, respectfully represents that on, to wit, the 15th day of April, A. D. 1887, petitioner owned the fee-simple title to and was in possession as such owner of the following-described surveys of land—that is to say, certain sections of land, each containing 640 acres, all surveyed by virtue of land certificates issued to the Houston & Great Northern Railroad Company and more particularly described as the following-numbered surveys in Childress county, State of Texas, to wit:

Surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99, in block # 9, and in the same county.

Surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, in block # 10, and in the same county.

9 Surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, in block # 14, and in the same county.

Surveys numbered 1, 3, 39, 41, 43, 79, 81, and 83, in block # 18, and in the same county.

Surveys numbered 1, 3, 19, in block # 19.

And the following-numbered surveys in Collingsworth county, in the State of Texas, to wit:

Surveys numbered 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 45, 47, 49, 51, 53, 55, 67, 69, 71, 73, 89, and 91, in block 10, and in same county.

Surveys numbered 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99, in block # 14, and in the same county.

Surveys numbered 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, and 37, in block # 15, and in the same county.

Surveys numbered 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, 87, 89, 91, 93, 95, 97, and 99, in block # 19, and in the same county.

Surveys numbered 1, 3, 5, 7, 9, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 45, 47, 49, 51, 53, 55, 57, 59, 61, and 43, in block # 21, and the following-numbered surveys in Donley county, State of Texas, to wit:

Surveys numbered 21, 39, 41, 43, 51, 59, 61, 65, 75, 77, 79, 91, 83, 85, 87, 95, 97, 99, in block # 20, and in the same county.

Surveys numbered 11, 13, 15, and 37, in block # 21, and in the county of Hall, in said State.

Surveys numbered 5, 7, 9, 11, 31, 33, 35, 37, 45, 49, 51, 71, 75, 77, 85, 87, 89, and 91, block # 18, and in the same county.

10 Surveys numbered 5, 7, 9, 11, 13, 15, and 17, in block # 19, and in the same county.

Surveys numbered 1, 3, and 19, in block # 20, making a grand total of one hundred and seventy-six thousand acres.

That on, to wit, the 15th day of April, the said Sam. Lazarus, without lawful authority and by force and arms, entered upon said land and put thereon large herds of cattle and horses for the purpose of pasturing them thereon, and from that time until now the cattle and horses of the said Sam. Lazarus have pastured upon said lands and consumed the grass found growing thereupon, and said Lazarus has during the whole of said time converted to his own use the said land and appropriated and taken to himself all of its benefits, to the annual damage of petitioner to the amount of fourteen thousand and eighty dollars. Petitioner charges that the pasturage of said lands so appropriated and used by the said Sam. Lazarus during the whole time it has been occupied and used by him has been and still is of the annual value of eight cents per acre thereof.

2nd. Plaintiff further represents that the said lands above described or a portion thereof, to wit, 292 surveys of 640 acres each, were by the New York & Texas Land Co., Limited, on, to wit, the 18th day of April, 1882, leased to W. R. Curtis and T. J. Atkinson, a partnership under the name and style of Curtis & Atkinson; that on said date the said parties respectively made and executed a contract for the lease of said lands for the term of five years, beginning on the 18th day of April, 1882, and ending on the 17th day of April, 1887. The said lessees agreed to pay to the said

11 lessor, its successors or assigns, in advance, on the first days of May and November of each year during the continuance of said lease, the sum of $3,668.80, making and annual rental of $7,337.60; and it was further provided in said lease contract that as additional compensation for the use of said lands so leased all improvements placed by the lessees upon the said land shall remain thereon and become the property of the said lessors or those having estate in the premises upon the termination of this lease, &c.; that under and in accordance with the said lease contract the

said Curtis & Atkinson entered into possession of the lands aforesaid and made fencing and dug wells and other improvements thereon, paying rent therefor; that afterwards, by purchase from the said New York and Texas Land Co., Limited, the plaintiff became the owner of the said lands and is now the owner thereof as hereinabove alleged; that about the time of the expiration of the said lease the said Sam. Lazarus, defendant, purchased each and all of the cattle of the said Curtis & Atkinson which were then running in the range upon the said lands; that defendant, instead of surrendering the said lands to plaintiff, as the said Curtis & Atkinson were bound to do, maintained possession thereof and has since maintained the same, and has maintained the fences around the whole of said lands, excluding others and the cattle of others therefrom, and has held and is now holding the exclusive possession of the same to his own use and benefit; that he has grazed the said lands of plaintiff's aforesaid from said date up to the present time, using the wells and improvements and using and consuming the grass on plaintiff's lands and appropriating the same to his own use; that the reasonable value of said lands for grazing at the time defendant took possession thereof was, to wit, the sum of about eight cents per acre, and the same has remained of said value up to and including the present time; that the reasonable rental value of the grass of said lands per annum since the defendant has been in possession thereof amounts to, to wit, the sum of fifteen thousand dollars; that by reason of the exclusive use and occupation of the said premises and the consumption of the grass thereon the said defendant has become liable and promised to pay plaintiff the reasonable value of the same, to wit, sum of fifteen thousand dollars, as aforesaid, but the defendant, though the same is long since due, has failed and refused to pay it or any portion thereof, though often demanded, to plaintiff's damage in the sum of fifty thousand dollars.

3rd. The premises considered, petitioner sues and prays that said Sam. Lazarus be cited to appear and answer this petition, and that petitioner have judgment for his damages aforesaid at the rate of eight cents per acre for each acre of said land annually from and including said 15th day of April, 1887, up to the date of the trial of this cause, and for his costs of suit; and, as in duty bound, will ever pray.

LEAKE, SHEPARD & MILLER,
Att'ys for Petitioner.

The foregoing is endorsed as follows, to wit:

1197. Wm. W. Phelps *vs.* Sam. Lazarus. Plaintiff's first amended original petition. Filed Jan. 31, 1890. J. H. Finks, clerk, by C. H. Lednum, d'p'y.

13 In U. S. Circuit Court, at Dallas.

WILLIAM W. PHELPS
vs.
SAM. LAZARUS. } # 1197.

Now comes the defendant in the above-entitled cause and says that he does not now and never did claim any right, title, or interest in the lands described in plaintiff's petition; that he has not now and never had possession of said lands or any of them; wherefore the said defendant prays that he may be hence discharged with costs.

And the said defendant, further answering, denies all and singular the allegations made by plaintiff in his pleadings, and demands strict proof of the same.

And the said defendant, further answering, shows that the lands described in plaintiff's petition are alternate sections with sections of like number and size owned by the public-school fund of the State of Texas; that prior to the summer of 1887, by some arrangement between plaintiff's vendor and the lessee of the said alternate sections owned by the school fund aforesaid, a large portion of the lands now claimed by plaintiff and the school sections alternating with them were enclosed or partly enclosed under one fence; that before the summer of 1887 the lease of said school sections had terminated, but the fence which wholly or partly enclosed the same with the land described in plaintiff 's petition was still standing, about one-half of said fence being upon the land claimed by plaintiff and belonging
14 to the owner of the land and the other half being upon the schoo- sections alternating therewith; that in the summer and early fall of 1887 defendant leased from the proper public authorities a large number of school sections, embracing, among others, those alternating with the sections described in plaintiff's petition; defendant also intended to lease from the owner of them the sections claimed by plaintiff, but the said owner and defendant were unable to agree upon terms; that defendant thereupon put upon the lands leased by him from the school fund as aforesaid his cattle; that there was no fence between the sections leased by defendant and those claimed by plaintiff, and the said cattle ranged indiscriminately upon the whole; defendant has had nothing whatever to do with any part of the fence about said lands; he owns none of said fence and has interfered with none of it in any way whatever; that he has never excluded plaintiff from any of the lands leased by defendant or claimed by plaintiff, nor asserted nor exercised over any of said lands claimed by plaintiff any right of possession, use, or title whatever; that he has used the sections leased by him from the school fund in the only way possible and without any denial or infringement of the right of the owner or owners of the alternate sections claimed by plaintiff. Wherefore defendant says that he is not liable to plaintiff in any sum for any cause, and he prays that he may go hence and recover of said plaintiff his costs, etc.

ROBERTSON & COKE,
Counsel for Def't.

15 The foregoing is endorsed as follows, to wit:

No. 1197. Wm. Walter Phelps *vs.* Sam. Lazarus. Original answer. Filed Feb. 3, 1890. J. H. Finks, clerk, by Chas. H. Lednum, d'p'y.

16 In the U. S. Circuit Court at Dallas.

W. W. PHELPS
vs.
SAM. LAZARUS. } No. —.

The defendant requests the court to give the following charges to the jury. Each is separately requested.

The jury is instructed that the plaintiff can recover no damages or judgment for trespasses committed on his lands by defendant's cattle unless there was a fence between his lands and those leased from the State by defendant.

The jury is instructed that in Texas the law is that the owner of stock is not required to keep them in an enclosure or to prevent them from ranging on the lands of others, and that the owner of land trespassed upon by cattle cannot recover from the owner of the cattle damages for the trespass unless his land is fenced.

Refused.

A. P. McCORMICK, *U. S. Judge.*

To entitle the plaintiff to recover in this suit you must believe from the evidence that the plaintiff's lands were fenced from those leased by defendant. If there was a common enclosure around the lands of plaintiff and those leased by the defendant and no fence separating the lands, then the plaintiff cannot recover.

17 If the jury find for plaintiff under any charge given, in estimating the damage the jury must be governed by the testimony. If there is no satisfactory proof of the amount the plaintiff is entitled to recover, and no proof of facts from which the jury can make any estimate, your verdict then will be for the plaintiff for nominal damages only—say one dollar or one cent.

Refused.

A. P. McCORMICK, *Judge.*

To find that defendant had the exclusive possession of plaintiff's land and to hold him liable for the rental value of said land you must believe from the evidence that the cattle owned and those controlled by the defendant were as many as could be properly maintained on the pasturage in said enclosure.

The plaintiff does not sue the defendant as a tenant nor upon any contract or agreement of the defendant to pay rent, and he cannot recover on account of any promise to pay rent or statement that he would pay rent.

Refused.

A. P. McCORMICK, *U. S. Judge.*

The foregoing is endorsed as follows, to wit:
1197. Charges requested by defendant. Filed Feb'y 3d, 1890.
J. H. Finks, clerk, by Chas. H. Lednum, d'p'ty.

18 If the jury find for plaintiff under any charge given in estimating the damage the jury must be governed by the testimony. If there is no satisfactory proof of the amount the plaintiff is entitled to recover and no proof of facts from which the jury can make any estimate, your verdict then will be for the plaintiff for nominal damages only—say one hundred dollars or *or* one cent.
Refused.

A. P. McCORMICK,
U. S. District Judge.

The foregoing is endorsed as follows, to wit:
No. 1197. Charges requested by defendant. Filed Feb. 3, '90.
J. H. Finks, clerk, by Chas. H. Lednum, d'p'y.

19 *Judgment.*

WM. W. PHELPS *vs.* SAM. LAZARUS. } No. 1197.

FEBR'Y 3RD, 1890.

On this day, this cause being called for trial, came the plaintiff by attorneys and came also the defendant in person and by attorneys and both parties announced ready for trial; then came a jury of twelve good and lawful men, to wit, Lon. Green, J. A. Henderson, T. H. Garrett, W. A. Robinson, J. A. Stewart, H. K. Hale, W. M. Humphreys, W. U. Lewis, S. P. Shaffer, John Gray, J. H. Rogers, and Frank Williamson, who were duly and legally selected, empannelled, and sworn to try this cause, and who, after hearing the pleadings, evidence, argument of counsel, and charge of the court, retired to consider of their verdict, and thereafter, on, to wit, Febr'y 5th, 1890, returned into open court the following verdict, to wit:

"We, the jury, find for the plaintiff and assess the rental value at two cents per acre per annum for the land in controversy, viz., 168,340 acres for 2½ years, amounting to $8,417.00.
"J. H. ROGERS, *Foreman.*"

It is therefore considered by the court and so ordered and adjudged that the plaintiff, William Walter Phelps, do have and recover of and from the defendant, Sam. Lazarus, the sum of eight thousand four hundred and seventeen dollars, with interest thereon from this date, at the rate of eight per cent. per annum, until paid, besides all costs by him herein incurred, for which plaintiff may have his execution.
It is further ordered that the officers of court do have and

recover of and from each party hereto the costs by them
20 herein respectively incurred, for which execution may also issue.

21 In U. S. Circuit Court at Dallas.

WM. WALTER PHELPS
vs.
SAM. LAZARUS. } No. —.

Now comes the defendant in the above-entitled cause and moves the court to set aside the judgment rendered herein on verdict found by the jury on the ground that the court erred in charging the jury to find for plaintiff and in refusing to charge the jury on the undisputed evidence to find for defendant as requested by defendant, the proof showing that there was no fence between plaintiff's land and that leased by defendant.

Wherefore, etc.

ROBERTSON & COKE,
Counsel for Def't.

The foregoing is endorsed as follows, to wit:

No. 1197. Wm. Walter Phelps *vs.* Sam. Lazarus. Motion for new trial. Filed Feb. 5th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, d'p'y.

22 *Order of Court Overruling Motion for a New Trial.*

WM. W. PHELPS
vs.
SAM. LAZARUS. } No. 1197.

FEBR'Y 17TH, 1890.

On this day came on to be heard the motion of the defendant for a new trial herein, and the court, having considered said motion and being fully advised as to the law, is of the opinion that said motion is not well taken; it is therefore ordered by the court that said motion be, and the same is hereby, overruled and refused.

23 In the Circuit Court of the U. S. for the Northern District of Texas, at Dallas.

WILLIAM WALTER PHELPS
vs.
SAM. LAZARUS. } No. 1197.

Be it remembered that on the trial of the above-entitled cause it was proved—

That on the 22nd day of April, 1887, the plaintiff became the owner in fee simple of the lands described in the plaintiff's petition, and that he has continued to be since such owner; that said lands consist of sections of 640 acres each, and that they alternate

with sections of an equal number and of same area owned by the public free school fund of the State of Texas.

That on April 17th, 1882, the plaintiff's vendor by a contract in writing leased the lands described in the plaintiff's pctition to Curtis & Atkinson for the period of five years from the date aforesaid at the rate of two cents per acre per annum, and that there was a stipulation in said contract that all permanent improvements erected upon said lands by said lessees during their term aforesaid should at the end of said term remain upon said leased lands and become the property of the lessor. The lessees did not lease the sections belonging to the school fund alternating with those leased from plaintiff's vendor, but on June 12th, 1887, the said
24 Curtis & Atkinson applied to the proper authorities of the State to lease the said alternate sections of land belonging to the public school funds, but failed and became bankrupt before any such lease was made.

That the said Curtis & Atkinson, during the term of their lease from plaintiff's vendor as aforesaid, in conjunction with persons owning or controlling the lands on the west, north, and east of the body of lands formed by the sections described in plaintiff's petition and those alternating therewith owned by the school fund as aforesaid, erected on said east, north, and west sides of said body of land a continuous and connected line of fence consisting of posts and four stran-s of barbed wire. On the south of said body of land was a body of land owned or controlled by the Childress Land & Cattle Co., and it was fenced on the east, west, and south sides, and on the east and west sides the said fence connected with the fence on the east and west sides of the body of land formed by the sections described in plaintiff's petition and the school-fund sections alternating therewith, so that at the end of the said Curtis & Atkinson's term the lands described in plaintiff's petition were inclosed in a continuous and connected fence in the same inclosure with the school-fund sections alternating with the sections described in plaintiff's petition and with the body of land owned or controlled by the Childress Land & Cattle Co. aforesaid, and the said lands described in plaintiff's petition were so inclosed on June 24th, 1887, and so continued until the fall of 1887.

25 That in the fall of 1887 the said Childress Land & Cattle Co. erected a fence which it had commenced in the summer of 1887 of posts and barbed wire along the north boundary line of the body of land owned or controlled by said company, which line was also the south boundary line of the body of land formed by the sections described in plaintiff's petition and the sections alternating therewith owned by the public free school fund as aforesaid, the said fence connecting with the fences on the east and west sides of said bodies of land and extended from the one to the other of said fences, so that after the erection of said fence, which was completed about October 6th, 1887, by said Childress Land & Cattle Co., the body of land formed by the sections described in plaintiff's petition, and the school sections alternating therewith, was in an inclosure to itself, except that in said inclosure were 3,135 acres sold or leased

by the plaintiff to parties other than defendant, and about 1,300 acres not owned by plaintiff or the school fund nor leased by defend-, and also a few sections of the school land taken up and occupied by actual settlers under the laws of the State of Texas, and the said lands described in plaintiff's petition have continued to be inclosed as aforesaid until the date of trial; that within said inclosure the plaintiff owned 168,300 *cares*, and the defendant had leased, as hereinafter shown, about 162,270; that there has never been any fence or fences dividing or separating the lands described in plaintiff's petition and the sections alternating therewith belonging to the public school fund as aforesaid; that none of the fences inclosing the body of land embracing the sections described in plaintiff's petition were built by defendant or by his authority,
26 and none of said fences have ever been repaired or kept up by defendant or by his authority, nor has defendant ever had anything to do with said fences, but the same have been kept up by those interested in or controlling lands bordering upon the different parts of said fences outside of the inclosure aforesaid.

That in September, 1887, the proper authorities of the State of Texas signed and delivered to defendant leases of the sections of land belonging to the public free school fund alternating with the sections described in plaintiff's petition for four years, beginning on June 12th, 1887, at four cents per acre per annum. The said leases related back to June 12th, 1887, because at that date the said Curtis & Atkinson had applied for leases of said land, and the proper officer of the State for some reason required the leases to commence from said June 12th, 1887.

That Curtis & Atkinson, during the term of their lease from plaintiff's vendor, had in the inclosure, which then embraced the lands leased by them, the alternate school sections, and the pasture of the Childress Land & Cattle Co., a large stock of cattle and several hundred head of horses, which, with the exception of about 11,000 head of said cattle removed by them from said pasture in the spring of 1887, remained in the inclosure aforesaid and were therein on June 24th, 1887; that during the term of the said Curtis & Atkinson they constructed within the inclosure aforesaid two tanks, one of which was upon a section of the land described in plaintiff's petition. There was no proof as to whether the other was upon the school sections or the sections belonging to the plaintiff.

27 That on June 24th, 1887, the defendant purchased from said Curtis & Atkinson all the cattle and horses they had in said inclosure, together with all their interest in the inclosing fences and all their right to corrals and watering tanks and whatever other property they had in said inclosure. After said purchase the said cattle and horses remained in said inclosure until the same was divided in two parts by the fence erected as aforesaid by the Childress Land & Cattle Co., and after said fence was erected to the date of trial the said cattle remained in the inclosure embracing the land described in plaintiff's petition and the school sections alternating

therewith, except such of said cattle as plaintiff shipped out yearly to market.

That there was in said inclosure as it existed upon June 24th, 1887, until the erection of the division fence by the Childress Land & Cattle Co. about 2,500 head of cattle owned by one Glasgow, and from June 24th to the date of trial some 200 or 300 head of cattle belonging to settlers. With the cattle of said Glasgow and said settlers the defendant had nothing to do.

That at the time defendant bought from Curtis & Atkinson there were in said inclosure, as the same then existed, 3,500 head of cattle belonging to B. C. Evans, which, after June 24th, 1887, were taken care of and pastured by defendant as the same then was and as it was left after the Childress fence was erected until the same were purchased by defendant from said Evans, in the year 1889.

28 Until said purchase the said Evans paid the said defendant for care and pasturage $5,000.00 the first year and for the remaining period $1.65 per head; that there were also about 3,000 calves that were sucking cows purchased by defendant from Curtis & Atkinson, which said calves the said Curtis & Atkinson had sold before the sale to defendant to some other person, and the owner of them paid defendant for keeping and caring for them in said inclosure until the spring of 1888 $2,500 *dollars*, when they were removed from said inclosure.

That the range in said onclosure showed signs of having been overstocked in the summer of 1887, and this condition continued through the years 1887 and 1888.

From June 24th, 1887, until the date of trial the cattle and horses owned by defendant and those controlled by him in the said inclosure were more than sufficient to consume the grass on the lands described in plaintiff's petition and the sections alternating therewith leased by defendant from the public free school fund. In no other wise than by having his said cattle and horses in said inclosure did the defendant ever exclude the plaintiff or any other person or anybody's cattle or stock from said inclosure or from any use of the plaintiff's lands therein. Negotiations were had after defendant bought the cattle and horses from Curtis & Atkinson between defendant and plaintiff's agents respecting a lease by defendant of the lands described in plaintiff's petition, but no agreement was reached between the parties as to the price to be paid plaintiff for lease of such lands, and the same were not leased by defendant or held by him as a tenant of plaintiff.

29 The proof showed the rental value of plaintiff's land was from two to four cents per acre per annum *per annum* during the years 1887, 1888, and 1889.

In this state of the proof, which was undisputed and which was the only proof made by either party affecting the issue as to defendant's liability to the plaintiff for damages to or the rental value of the land described in plaintiff's petition, the defendant requested the court to charge the jury that "in Texas the law is that the owner of stock is not required to keep them in an inclosure or to prevent them from ranging on the lands of others, and that the

owner of lands trespassed upon by cattle cannot recover from the owner of the cattle damages for the trespass unless his land is fenced;" and, further, that "to entitle the plaintiff to recover in this suit you must believe from the evidence that the plaintiff's lands were fenced from those leased by defendant. If there was a common inclosure around the lands of plaintiff and those leased by the defendant and no fence separating said lands, then the plaintiff cannot recover." This request was refused by the court, and the court, after summarizing the proof, charged the jury on the issue as to defendant's liability as follows: "The contention of the plaintiff is that at the time the defendant bought from Curtis & Atkinson the stock they had in this inclosure said pasture was overstocked, and that the defendant with his own cattle and cattle controlled by him has kept the same so overstocked as to consume all the pasturage on the sections of State land and all the grass on the lands of the plaintiff. I will not deliver you a law lecture or
30 burden you with the consideration of formulated abstract propositions, but charge you, as I am authorized to do, that the law is if the defendant has kept said inclosure so overstocked, as plaintiff claims, then the defendant is liable to the plaintiff for the value of the rent of plaintiff's lands as you may find it to be from the proof. If, therefore, the proof satisfies you that the defendant has kept in said inclosure such a number of stock as not only consumed all the pasturage on the lands he had leased from the State but also all the grass on the lands of plaintiff you will find for the plaintiff and assess his damage at what you find from the proof to be the reasonable value of the rent of plaintiff's said lands from the 24th day of June, 1887, until now;" and when said charge was given defendant requested the court to instruct the jury that if they were not so satisfied from the evidence to find for the defendant, but this the court refused to do, and the said defendant then and there excepted to the action of the court in refusing to instruct the jury, as requested by him upon the issue, as to his liability to the plaintiff, and also the charge of the court upon said issue above quoted and to the action of the court in refusing to present to the jury the alternative that they should find for the defendant if they did not believe from the evidence the matters contained in the court's charge; and this bill of said exceptions is allowed by the court and signed and sealed and ordered to be filed as part of the record in this cause.

February 19th, 1890.

A. P. McCORMICK,
U. S. District Judge.

31 The foregoing is endorsed as follows, to wit:

No. 1197. Wm. W. Phelps *vs.* Sam. Lazarus. Bill of exceptions. Filed February 19th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, d'p'y.

32 UNITED STATES OF AMERICA,
Northern District of Texas.

To the honorable justices of the Supreme Court of the United States:

And now comes Sam. Lazarus, by Sawnie Robertson, his attorney, and complains that in the records and proceedings and also in the rendition of judgment in the suit between William Walter Phelps, plaintiff, and said Sam. Lazarus, defendant, tried in the circuit court of the United States for said district, at the January term thereof, A. D. 1890, in which judgment was rendered against him on the — day of February, A. D. 1890, manifest error hath intervened, to the great damage of the said Sam. Lazarus. Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court aforesaid.

SAWNIE ROBERTSON,
Counsel for Patitioner.

Allowed Feb. 19, 1890.

A. P. McCORMICK,
U. S. Dis. Judge.

The foregoing is endorsed as follows, to wit:

Sam. Lazarus *vs.* Wm. Walter Phelps. Petition for writ of error. Filed Feb. 19th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, d'p'y.

33 Supreme Court of the United States.

SAM. LAZARUS, Plaintiff in Error,
vs.
WILLIAM WALTER PHELPS, Defendant in Error.

Know all men by these presents that we, Sam. Lazarus, as principal, and R. M. Smith and Jot Gunter, as sureties, are held and firmly bound unto William Walter Phelps in the sum of twelve thousand dollars ($12,000.00), to be paid to the said William Walter Phelps, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 11 day of February, 1890.

Whereas the above-named Sam. Lazarus has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Texas, at Dallas, by which judgment the said William Walter Phelps recovered against the said Sam. Lazarus the sum of eight thousand four hundred and seventeen dollars ($8,417) and all costs of suit, which said judgment was rendered in said court on the 5th day of February, A. D. 1890:

Now, therefore, the condition of this obligation is such that if the above-named Sam. Lazarus shall prosecute his said writ of error

to effect and answer all costs and damages if he shall
34 fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

SAM. LAZARUS. [SEAL.]
R. M. SMITH. [SEAL.]
JOT GUNTER. [SEAL.]

The foregoing bond is hereby accepted and approved as a writ of error supersedeas bond in the cause described in it Febr'y 19, 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

STATE OF TEXAS, }
County of Grayson. }

I, —— ——, clerk of district court of Grayson county, Texas, hereby certify that I know R. M. Smith, whose genuine signature appears to the foregoing bond, and that he has property over and above all known or suspected liabilities of more than the value of 25,000 dollars, and that I would approve the foregoing bond if I was officially required to pass on the same.

Witness my hand and seal of office this Febr'y 11th, 1890.

E. O. THOMAS,
[SEAL.] *Clerk District Court, Grayson County, Texas.*

STATE OF TEXAS, }
County of Dallas. }

I, R. E. L. Knight, a notary public in and for the above county and State, hereby cer-ify that Jot Gunter signed the foregoing bond in my presence and acknowledged before me that he executed the same for the purposes stated in it.

35 Witness my hand and seal of office this Febr'y 14, 1890.

R. E. L. KNIGHT,
[SEAL.] *Not. Pub., Dallas Co., Texas.*

The foregoing bond is endorsed as follows, to wit:

William Walter Phelps *vs.* Sam. Lazarus. Writ *od* error bond. Filed Febr'y 19, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

36 UNITED STATES OF AMERICA, *ss:*

To William Walter Phelps, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the 5th circuit and northern district of Texas, wherein Sam. Lazarus is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable judge of the district court of the United States for the northern district of Texas, at Dallas, sitting as one of the judges of the circuit court, this the 19 day of February, A. D. 1890.

A. P. McCORMICK,
U. S. Dist. Judge.

37 [Endorsed:] Sam. Lazarus *vs.* William Walter Phelps. Citation in error. Judge to sign and then bring back. We hereby accept service & waive copy of citation in error in the above cause this Febr'y 24, 1890. Leake, Shepard & Miller, counsel for defendant in error. Filed Feb'y 24, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

38 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judge of the circuit court of the United States for the northern district of Texas, Greeting:

Because that in the records and process and also in the rendering of judgment in a suit before you or some of you, between Sam. Lazarus, a citizen of the State of Texas, plaintiff in error, and William Walter Phelps, a citizen of the State of ——, defendant in error, a manifest error has intervened, to the great damage of the said plaintiff in error, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the Chief Justice and associate justices of the Supreme Court of the United States on the second Monday of October next, at Washington, being the present seat of the National Government, that, the record aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Melville Weston Fuller, Chief Justice of said Supreme Court, at Washington aforesaid, this the 19 day of February, in the year of our Lord eighteen hundred and ninety, and the Independence of the United States the 114.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy.*

Allowed.
A. P. McCORMICK,
U. S. Dist. Judge.

39 [Endorsed:] Sam. Lazarus *vs.* William Walter Phelps. Writ of error. Filed Feb'y 19, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy. A duplicate of this writ has been lodged with me for defendant in error. Witness my hand this Febr'y 19, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

40 In U. S. Supreme Court.

SAM. LAZARUS, Plaintiff in Error,
vs.
W. W. PHELPS, Defendant in Error.

Now comes Sam. Lazarus, plaintiff in error, and respectfully shows to the court that in the trial and judgment below in said cause the court erred in instructing the jury that the plaintiff in error, defendant below, was liable to defendant in error, the plaintiff below, for the value of the use and occupation of the land of defendant in error if plaintiff in error had in the common inclosure more cattle than were sufficient to consume the grass on the land leased from the State of Texas by the plaintiff in error, and in refusing to charge the jury that the plaintiff in error was not so liable unless it was shown that the defendant in error had fenced his land from the land leased by the plaintiff in error.

Wherefore the plaintiff in error prays that the judgment below may be reversed and for such other orders as the record may require.

ROBERTSON & COKE,
Counsel for Plaintiff in Error.

[Endorsed:] Sam. Lazarus *vs.* Wm. W. Phelps. Assignment of errors. Filed August 18th, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

41 *Clerk's Certificate.*

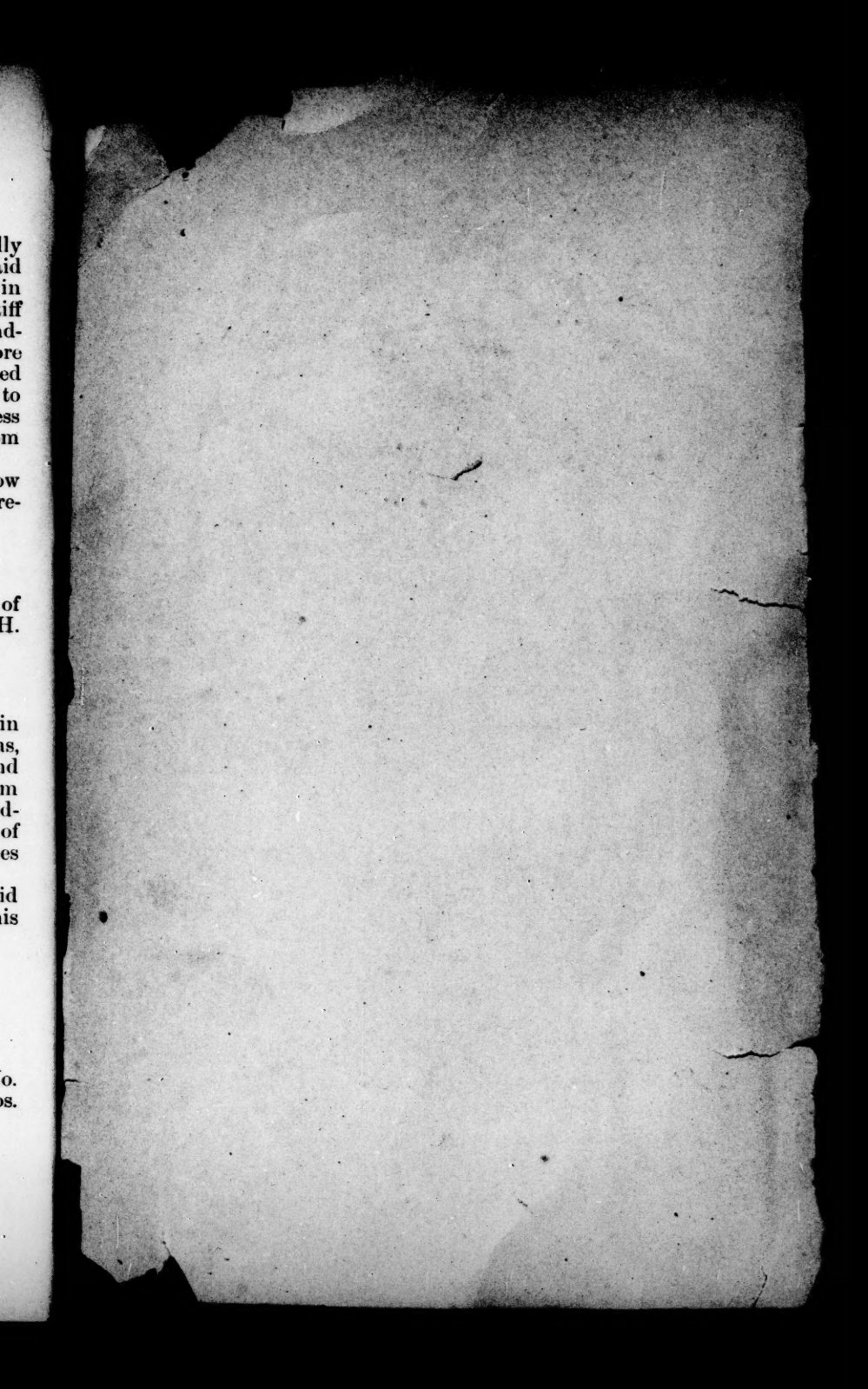
I, J. H. Finks, clerk of the circuit court of the United States in and for the fifth circuit thereof and the northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in cause numbered 1197 of William Walter Phelps, plaintiff, *versus* Sam. Lazarus, defendant, lately pending in said court, at Dallas, Texas, except that the original writ of and citation in error are included in the transcript instead of copies thereof.

In testimony whereof I have hereunto affixed the seal of said court, at Dallas, Texas, and the signature of the clerk thereof this the 16th day of September, A. D. 1890.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS,
Clerk of said Circuit Court,
By CHAS. H. LEDNUM, *Deputy.*

Endorsed on cover: Case No. 14,228. N. Texas C. C. U. S. No. 225. Sam. Lazarus, plaintiff in error, *vs.* William Walter Phelps. Filed October 9, 1890.



Office Supreme Court U. S.
FILED.
DEC 20 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 225.

SAM LAZARUS, PLAINTIFF IN ERROR,

vs.

WILLIAM WALTER PHELPS, DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

HENRY C. COKE,
Attorney for Plaintiff in Error.

John F. Worley, Printer, Dallas, Texas.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 225.

SAM LAZARUS, PLAINTIFF IN ERROR,

vs.

WILLIAM WALTER PHELPS, DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

This suit was instituted by William Walter Phelps, as plaintiff, against Sam Lazarus as defendant, in the Circuit Court of the United States for the Northern District of Texas at Dallas on September 17, 1888. Plaintiff, in substance, alleges in his pleadings that he was on April 15, 1887, the owner in fee and in possession of 176,000 acres of land in Texas, describing and locating it, consisting of sections or surveys of 640 acres each; that on said dates defendant, without authority, entered upon said lands and put thereon large herds of cattle and horses for the purpose of pasturing them thereon, and that said defendant's said cattle and horses had pastured on said lands continuously since said date and consumed the grass growing thereon. That the reasonable value of said lands for grazing purposes during the time they

were so occupied and used by defendant, was eight cents per acre per annum; that since the date aforesaid defendant had converted said lands to his own use and appropriated and taken to himself all their benefits and had refused to pay plaintiff therefor; wherefore he asks judgment against defendant for eight cents per acre per annum from April 15, 1887 to date of trial, etc. (R. pp. 1 and 2 and 4 to 6.) The answer of defendant consisted of a denial that he claimed or ever had claimed any right, title or interest in the lands described in plaintiff's petition, or that he was in possession or ever had been in possession of said lands or any of them; a general denial of plaintiff's allegations, and a special plea or answer setting up substantially that the lands claimed by plaintiff were alternate sections with sections of like number and size belonging to the public school fund of the State of Texas; that in the summer or fall of 1887 defendant leased from the proper authorities of the State of Texas, a large number of school sections, embracing among others those alternating with the sections claimed by plaintiff; that prior to this lease, by some arrangement between plaintiff's vendor and a former lessee of said lands, a large portion of plaintiff's lands and said school sections alternating therewith, were inclosed or partly so, in one fence. That at the date of defendant's lease of said school sections, said fence was still standing, one-half of it being on said school sections, and the other half on plaintiff's lands, the portion on plaintiff's lands belonging to him. That after making said lease of said school sections defendant put his cattle upon the lands so leased. That there were no fences between the sec-

tions leased by defendant and those claimed by plaintiff, and said cattle ranged indiscriminately upon the whole. That defendant had never owned any part of the fence around the lands or had anything whatever to do with it. That he had never excluded plaintiff from any of the lands leased by him or claimed by plaintiff, nor asserted or exercised over plaintiff's said lands any right of possession, use or title. That he used the school sections leased by him in the only way possible and without any denial or infringement of the rights of the owner of the alternate sections claimed by plaintiff. (R. p. 7.) The case came on for trial February 3, 1890, and resulted in a verdict and judgment for plaintiff for $8,417. (R. p. 9.)

The facts proven on said trial, and the rulings of the court are shown by bill of exceptions as follows:

That on the 22nd day of April, 1887, the plaintiff became the owner in fee simple of the lands described in the plaintiff's petition, and that he has continued to be since such owner; that said lands consist of sections of 640 acres each and that they alternate with sections of an equal number and of same area owned by the public free school fund of the State of Texas.

That on April 17th, 1882, the plaintiff's vendor by a contract in writing leased the lands described in the plaintiff's petition to Curtis & Atkinson for the period of five years from the date aforesaid at the rate of two cents per acre per annum, and that there was a stipulation in said contract that all permanent improvement erected upon said lands by said lessees during their term aforesaid should at the end of said term remain upon said leased lands and become the property of the

lessor. The lessees did not lease the sections belonging to the school fund alternating with those leased from plaintiff's vendor, but on June 12th, 1887, the said Curtis & Atkinson applied to the proper authorities of the State to lease the said alternate sections of land belonging to the public school fund, but failed and became bankrupt before any such lease was made.

That said Curtis & Atkinson, during the term of their lease from plaintiff's vendor as aforesaid, in conjunction with persons owning or controlling the lands on the west, north and east of the body of lands formed by the sections described in plaintiff's petition and those alternating therewith owned by the school fund as aforesaid, erected on said east, north and west sides of said body of land a continuous and connected line of fence consisting of posts and four strands of barbed wire. On the south of said body of land was a body of land owned or controlled by the Childress Land and Cattle Co., and it was fenced on the east, west and south sides, and on the east and west sides the said fence connected with the fence on the east and west sides of the body of land formed by the sections described in plaintiff's petition and the school fund sections alternating therewith, so that at the end of the said Curtis & Atkinson's term the lands described in plaintiff's petition were inclosed in a continuous and connected fence in the same inclosure with the school fund sections alternating with the sections described in plaintiff's petition and with the body of land owned or controlled by the Childress Land and Cattle Co. aforesaid, and the said lands described in

plaintiff's petition were so inclosed on June 24th, 1887, and so continued until the fall of 1887.

That in the fall of 1887 the said Childress Land and Cattle Co. erected a fence which it had commenced in the summer of 1887, of posts and barbed wire along the north boundary line of the body of land owned or controlled by said company, which line was also the south boundary line of the body of land formed by the sections described in plaintiff's petition and the sections alternating therewith owned by the public free school fund as aforesaid, the said fence connecting with the fences on the east and west sides of said bodies of land and extending from the one to the other of said fences, so that after the erection of said fence which was completed about October 6, 1887, by said Childress Land and Cattle Co., the body of land formed by the sections described in plaintiff's petition, and the school sections alternating therewith, was in an inclosure to itself, except that in said inclosure were 3,135 acres sold or leased by the plaintiff to parties other than defendant, and about 1,300 acres not owned by plaintiff or the school fund nor leased by defendant, and also a few sections of the school land taken up and occupied by actual settlers under the laws of the State of Texas; and the said lands described in plaintiff's petition have continued to be inclosed as aforesaid until the date of trial. That within said enclosure the plaintiff owned 168,300 acres, and the defendant had leased as hereinafter shown, about 162,270 acres; that there has never been any fence or fences dividing or separating the lands described in plaintiff's petition and the sections alternating there-

with belonging to the public school fund as aforesaid; that none of the fences inclosing the body of land embracing the sections described in plaintiff's petition were built by defendant or by his authority, and none of said fences have ever been repaired or kept up by defendant or by his authority, nor has defendant ever had anything to do with said fences, but the same have been kept up by those interested in or controlling lands bordering upon the different parts of said fences outside of the inclosure aforesaid.

That in September, 1887, the proper authorities of the State of Texas signed and delivered to the defendant leases of the sections of land belonging to the public free school fund and alternating with the sections described in plaintiff's petition, for four years, beginning on June 12, 1887, at four cents per acre per annum. The said leases related back to June 12, 1887, because at that date the said Curtis & Atkinson had applied for leases of said land, and the proper officer of the State for some reason required the leases to commence from said June 12th, 1887.

That Curtis & Atkinson during the term of their lease from plaintiff's vendor, had in the inclosure which then embraced the lands leased by them, the alternate school sections and the pasture of the Childress Land and Cattle Co., a large stock of cattle and several hundred head of horses, which with the exception of about 11,000 head of said cattle removed by them from said pasture in the spring of 1887, remained in the inclosure aforesaid and were therein on June 24, 1887. That during the term of the said Curtis & Atkinson they con-

structed within the inclosure aforesaid two tanks, one of which was upon a section of land described in plaintiff's petition. There was no proof as to whether the other was upon the school sections or the sections belonging to the plaintiff.

That on June 24, 1887, the defendant purchased from said Curtis & Atkinson all the cattle and horses they had in the said inclosure, together with all their interest in the inclosing fences and all their right to corrals and watering tanks and whatever other property they had in said inclosure. After said purchase the said cattle and horses remaining in said inclosure until the same was divided into two parts by the fence erected as aforesaid by the Childress Land and Cattle Co., and after said fence was erected to the date of trial the said cattle remained in the inclosure embracing the land described in plaintiff's petition and the school sections alternating therewith except such of said cattle as plaintiff shipped out yearly to market.

That there was in said inclosure as it existed upon June 24, 1887, until the erection of the division fence by the Childress Land and Cattle Co., about 2,500 head of cattle owned by one Glasgow, and from June 24, to the date of trial, some 200 or 300 head of cattle belonging to settlers. With the cattle of said Glasgow and said settlers defendant had nothing to do.

That at the time defendant bought from Curtis & Atkinson there were in said inclosure, as the same then existed, 3,500 head of cattle belonging to B. C. Evans which, after June 24, 1887, were taken care of and pastured by defendant as the same then was and as it was

of the plaintiff. I will not deliver you a law lecture or burden you with the consideration of formulated abstract propositions, but charge you, as I am authorized to do, that the law is that if the defendant has kept said inclosure so overstocked as plaintiff claims, then the defendant is liable to the plaintiff for the value of the rent of plaintiff's lands as you may find it to be from the proof. If therefore the proof satisfies you that the defendant has kept in said inclosure such a number of stock as not only consumeed all the pasturage on the lands he had leased from the State, but also all the grass on the lands of plaintiff, you will find for the plaintiff and assess his damage at what you find from the proof to be the reasonable value of the rent of plaintiff's said lands from the 24th day of June, 1887, until now," and when said charge was given defendant requested the court to instruct the jury that if they were not so satisfied from the evidence, to find for the defendant, but this the court refused to do, and the said defendant then and there excepted to the action of the court in refusing to instruct the jury as requested by him upon the issue, as to his liability to the plaintiff, and also the charge of the court upon said issue above quoted, and to the action of the court in refusing to present to the jury the alternative that they should find for the defendant if they did not believe from the evidence the matters contained in the court's charge. (R. pp. 10 to 14.)

Plaintiff in error relies for a reversal of this case upon a single assignment of error, which is as follows:

"Now comes Sam Lazarus, plaintiff in error, and respectfully shows to the court that in the trial and judg-

ment below in said cause the court erred in instructing the jury that the plaintiff in error, defendant below, was liable to defendant in error, the plaintiff below, for the value of the use and occupation of the land of defendant in error if plaintiff in error had in the common inclosure more cattle than were sufficient to consume the grass on the land leased from the State of Texas by the plaintiff in error, and in refusing to charge the jury that the plaintiff in error was not so liable unless it was shown that the defendant in error had fenced his land from the land leased by the plaintiff in error." (R. p. 18.)

The rule of the common law is that a land proprietor is not obliged to fence against cattle of others, but the owner of cattle must confine them to his own lands and will be liable for any trespass they commit upon the uninclosed lands of others. That this rule is not and has never been in force in Texas is not an open question.

The statue law of Texas so far as material is as follows:

"Every gardner, farmer or planter shall make a sufficient fence about his cleared land in cultivation at least five feet high and make such fence sufficiently close to prevent hogs from passing through the same." (Rev. Statutes of Texas, Art. 2431, act of February 5, 1840.)

"If it shall appear that the said fence is insufficient then the owner of such cattle, horses, hogs or other stock shall not be liable to make satisfaction for such damages." (Rev. Stat. of Texas, Art. 2434, act of October 1, 1871.)

In Ry. Co. vs. Johnson, 65 Tex., pp. 393-4, the court say: "Since the fence law of 1840 the owner of uninclos-

ed land has no right of action for the intrusion of stock upon it." * * * "The appellee had no right to graze his cattle on these leagues, but in doing so was guilty of no actionable wrong. In letting his stock range on this land he asserted no right in the land and acquired none."

In Pace vs. Potter, 85 Tex., p. 476, the court say:

"It is not contended that the rule of the common law making it the duty of the owner of cattle to confine them to his own land and holding him liable for trespass committed by them upon the uninclosed land of another, was ever in force in this State. It is inapplicable to our situation and the customs and habits of the early settlers of the country, and inconsistent with our legislation in regard to fences and stock. Rev. Stats., titles 43, 93; Railway vs. Johnson, 65 Tex., 389; Buford vs. Houtz, 133 U. S., 320; 7 Am. and Eng. Ency. of Law, 889."

To the same effect *see Buford vs. Houtz, 133 U. S., 320*, and authorities there cited.

7 Am. and Eng. Ency. of Law, 890, and authorities cited in Note 3.

No analysis of the court's rulings in the giving and refusing of instructions will disclose the legal theory upon which they were made. It cannot be ascertained from them whether he considered the lands of defendant in error inclosed or uninclosed, or why it was that the liability of plaintiff in error depended upon the number of cattle he had in the inclosure. Under the facts proven the charge given was in effect a simple direction to find for the defendant in error. It is shown by the bill of exceptions in this case that in said inclosure there were 3135 acres of land sold or leased by defendant in error

to parties other than plaintiff in error, and about 1800 acres not owned by defendant in error or the public school fund and not leased by plaintiff in error and a few sections of school land taken up and occupied by actual settlers under the laws of Texas. Said bill of exceptions further showed "that within said inclosure the plaintiff owned 168,300 acres, and the defendant had leased as hereinafter shown, about 162,270 acres; that there has never been any fence or fences dividing or separating the lands described in plaintiff's petition and the sections alternating therewith belonging to the public school fund as aforesaid; that none of the fences inclosing the body of land embracing the sections described in plaintiff's petition were built by defendant or by his authority, and none of said fences have ever been repaired or kept up by defendant or by his authority, nor has defendant ever had anything to do with said fences, but the same have been kept up by those interested in or controlling lands bordering upon the different parts of said fence outside of the inclosure aforesaid." (R. p. 12.) And further that "in no otherwise than by having his said cattle and horses in said inclosure did the defendant ever exclude the plaintiff or any other person or anybody's cattle or stock from said enclosure or from any use of the plaintiff's lands therein." (R. p. 13.)

The court instructed the jury as follows:

"If, therefore the proof satisfies you that the defendant has kept in said inclosure such a number of stock as not only consumed all the pasturage on the lands he had leased from the State, but also all the grass on the

lands of plaintiff, you will find for the plaintiff, and assess his damage," etc. (R. p. 14.)

Under the facts proven and hereinbefore set out the lands of defendant in error were as to plaintiff in error either inclosed or uninclosed. If they were inclosed, then the permitting of any of the cattle of plaintiff in error to range and graze upon them, was a trespass for which he was liable without regard to the number so ranging and grazing. One animal under such circumstances would have given defendant in error as complete and perfect a cause of action as one hundred thousand. If the lands were inclosed plaintiff in error could not graze them with any number of cattle, however small. The land owner's right in such a case is not to keep the most of his grass and to have most of his land ungrazed by the cattle of others, but to keep all of his grass and to have all of his land ungrazed by the cattle of others. The number of cattle in such case could never determine the question of liability, but could be relevant only to the question of the amount of damage. If said lands of defendant in error were uninclosed as to plaintiff in error, then under the authorities hereinbefore cited, it is clear that the plaintiff in error did not invade the legal rights of defendant in error and committed no trespass by permitting his cattle to graze upon them, and this too, regardless of the number of said cattle. The number of the cattle under this phase of the case is not more relevant to the question of liability than would be their sex or color. The court tells the jury to find for defendant in error if they find that plaintiff in error "has kept in the inclosure such a number of stock as not only con-

sumed all the pasturage on the lands he had leased from the State, but also all the grass on the lands of plaintiff." How can the consumption of the grass on the lands of plaintiff in error in any manner affect or fix the right of defendant in error? If any legal injury is done him it is by eating and consuming his grass. If the grass is all eaten off his lands what difference can it make to him, or how can it affect his rights, that the lands of another are, or are not in the like condition? Suppose instead of being alternate sections the lands of defendant in error and those leased by plaintiff in error, lay in solid bodies but in the same common inclosure, and that plaintiff in error put in said inclosure only enough cattle to eat the grass on his own lands, but for some reason the said cattle preferred the grass on the lands of defendant in error and consumed it all, leaving the grass on the lands of plaintiff in error. Under the logic of the court's charge plaintiff in error would not be liable. The injury, however, to defendant in error would be as great, and exactly the same, as it would have been if said cattle had possessed the capacity at the same time to consume all the grass on the lands of plaintiff in error. It would seem therefore, that under no phase of this case could the number of said cattle of plaintiff in error be the test of his liability to defendant in error, and that the charge given was therefore erroneous.

That the lands of the defendant in error were uninclosed as to plaintiff in error, will clearly appear by a perusal of the facts proven on the trial, and hereinbefore set out. That a section of land of 640 acres in a body of land containing nearly 350,000 surrounded by one fence

and without a single cross fence, is unfenced and uninclosed as to the remainder of said lands in said common inclosure and the owners thereof, scarcely needs argument; but if one is needed there is a cogent one at hand in the case of Pace vs. Potter, 85 Tex., p. 476, where the facts are strikingly similar to those in this case. There the court say: "Under the proof, we are of the opinion that the plaintiff's land must be treated as having been unfenced in respect to the cattle belonging to the defendant. Before any inclosure was made in that section of the country it was all subject to be grazed upon by the cattle of every body, while running at large, without creating a cause of action in favor of the owners of the lands against the owners of the cattle. No cattle owner had then the right to confine or herd his stock upon another person's land, or in any manner inclose or take possession of it. But if the owner of any land desired to exclude from it cattle, when running at large, he could do so by inclosing his own land. After that was done in one instance, all outside or uninclosed land continued in its former status. The appropriate remedy of every land owner, including the last one whose land continued in its original condition, was to fence his land, as others had done." * * * "None of the fences were constructed by the plaintiff, and none by the defendant before this controversy arose, except on his east line, or between him and the land of the Kit Carter Cattle Co., which was constructed at his instance. By the acts and agency of other land owners a large body of the land belonging respectively to the plaintiff, the defendant and the Kit Carter Cattle Co., was fenced in the same inclos-

ure. As to said owners these lands were in the identical situation that existed before any of the contiguous lands had been fenced. To say the least, each of said owners had the right to put his own cattle upon his own land, inside the general inclosure existing as the result of the fencing in of their own lands by the surrounding owners. If the defendant desired to protect his land from the Cattle of the Kit Carter Cattle Co., his remedy was by fencing it off. He did that. If he had desired the same protection against the plaintiff's cattle, his remedy would have been the same. It does not appear, however, that he needed such remedy against the plaintiff. The plaintiff's condition was in every particular the same. If he desired protection against the cattle of an adjoining land owner, his remedy was to construct a fence for the purpose. He did not do so. On the contrary, the defend ant, it seems, constructed a fence for the sole purpose of protecting plaintiff's land. We do not think that he was under obligation to do so, nor that before it was constructed he was liable to plaintiff for the acts complained of."

If the lands of defendant in error were uninclosed as to plaintiff in error, then under the facts of this case plaintiff in error was guilty of no trespass and no breach of the rights of defendant in error by permitting his cattle to graze upon said lands. If defendant in error desired to protect said lands against said cattle he could have done so by fencing them; until he did fence them he suffered no legal injury. This proposition is fully sustained by the authorities hereinbefore cited. It follows that the court erred in refusing to instruct the jury as re-

quested by plaintiff in error, that "in Texas the law is that the owner of stock is not required to keep them in an inclosure or to prevent them from ranging on the lands of others and that the owners of lands trespassed upon by cattle cannot recover from the owner of the cattle damages for the trespass unless his land is fenced;" and further, that "to entitle the plaintiff to recover in this suit you must believe from the evidence that the plaintiff's lands were fenced from those leased by defendant. If there was a common inclosure around the lands of plaintiff and those leased by the defendant and no fence separating said lands, then the plaintiff cannot recover."

For the errors above pointed out it is respectfully submitted that the judgment rendered herein should be reversed by this court, and judgment rendered for plaintiff in error.

HENRY C. COKE,
Attorney for Plaintiff in Error.

FILED,
JAN 13 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 225.

SAM. LAZARUS, PLAINTIFF IN ERROR,

vs.

WILLIAM WALTER PHELPS, DEFENDANT IN ERROR.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

LEAKE, HENRY & REEVES,
LEIGH ROBINSON,
For Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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I.

The case assumed by plaintiff in error and upon which the authorities cited on his behalf bear is not the case as tried below or exhibited in the record.

The court below did not try the case upon the theory that the owner of unfenced land in Texas can recover damages from the owner of cattle, which in roaming the prairies stray thereon and consume his grass. It is, nevertheless, true that this exception to the rule of the common law, if it exists at all, is limited strictly to the exemption of the owner of *straying* cattle from liability for their *trespass* upon unfenced land. It confers no right to enter upon and depasture the lands of others simply because they are open to invasion. The owner of the cattle is technically a trespasser, but this

exception to the rule of the common law brings him, so to speak, within the principle of *damnum absque injuria*. In other words, if A owns unfenced lands and B's cattle in roaming the country (as would happen more often formerly, when the greater part of the State was public land, than now) strayed upon A's land and grazed there, A could not recover of B (as at common law he might) damages on account of this casual straying and pasturing; but B had no right to drive his cattle upon or near to A's land with the intent that they should graze upon it. If they strayed thereon A could drive them off without incurring liability. He owed them no care, and if they became mired in marshes or fell into pits or were stolen or killed by others or contracted disease by coming in contact with diseased cattle of others also straying upon the land he was not liable to the owner of them. All that could be expected of him was that he should not wilfully do them injury.

These ideas are directly or by analogy supported by the only case in Texas plainly in point—Ohio Wool Growing Co. *vs.* Bogel, 3rd Tex. Civil Appeals, section 273, page 331. This case was decided March 3, 1887, by the court of appeals, which, as then constituted, had appellate jurisdiction in a class of civil cases limited in amount. The case is reported in condensed form by one of the judges of the court, and, as stated by him, was to recover damages for grass consumed, etc., by defendant's sheep, which had been herded upon plaintiff's land for several days. The court below—necessarily upon the theory of the plaintiff in error in this case—denied the recovery. This judgment was reversed. The court held, as stated in the report, "The land was unenclosed, and this fact appears to have been regarded as very material upon the trial. Counsel for appellant requested the court to charge the jury that to entitle plaintiff to recover for a trespass upon his real estate it was not necessary that such real estate should be enclosed. The court refused to so charge. Under the facts of this case the charge asked

was a proper one and should have been given. It was alleged and proved that appellee entered upon appellant's land with the sheep and herded and pastured said sheep upon said land for several days. The sheep were not loose and straying upon said land, but were driven and herded upon it by appellee, against the written protest of appellant. Such being the case, appellee is unquestionably liable for the damage directly caused and naturally and proximately resulting from appellee's wrongful act."

In Davis *vs.* Davis, 70th Texas, 123, the supreme court said incidentally that "the rule of the common law has not been regarded as applicable to the condition of lands in this State, where for a long time throughout its limits and still in many sections the inclosure is the exception and the open ~~line~~ range the rule. Still, every owner of land in this State is entitled to its exclusive enjoyment. If he takes no steps to guard against the entrance of his neighbors' cattle he cannot complain if they roam over and graze upon it. If he incloses it his inclosure must be respected, although it may not be a statutory fence."

In that case the plaintiff had surrounded his land with a fence that was not at all sufficient under the fence laws of the State. The defendant turned his cattle upon the land so fenced, and the plaintiff brought an action to enjoin him from such occupation, and the court granted the relief as prayed for.

We may add here, too, that the public policy of Texas some years prior to this suit, with respect to grazing lands, underwent a radical change. The State, in 1879, instituted the policy of raising revenue from her hitherto public grazing grounds. It is a matter of common knowledge that cattle-raisers had begun to abandon the practice of turning cattle loose upon the plains to range at will, mingling with others, and instead to inclose large pastures. As the State, with rare exceptions, owned the alternate sections of land in these, the inclosers were enabled to make exclu-

sive use of the State's grass within their pastures. The first law on the subject was passed in 1879 (Acts 1879, ch. 92, sec. 6) and provided that "any person who shall control inclosed lands belonging to the public free schools and fail to pay the rental value as specified under the provisions of this act upon the demand of the collector shall be subject to prosecution upon complaint, information, and indictment, and fined in the sum of one hundred dollars for each section so inclosed."

In view, now, of the law of Texas, as shown by the decision and statutes aforesaid, let us see what the material facts of this case are:

1. Of the lands grazed by defendant the plaintiff, Wm. Walter Phelps, owned 168,300 acres, and the State of Texas about 162,270 acres. These lay in alternate sections of six hundred and forty acres each, the odd-numbered sections belonging to Phelps and the even numbers to the State of Texas. There were a few scattered sections of land among these which had been sold to other persons.

2. On April 17, 1882, Curtis and Atkinson leased the Phelps land from his vendor, who then owned them, for a period of five years, at two cents per acre per annum.

3. The lease stipulated that all permanent improvements made on the land by the lessees should become the property of the lessor at the expiration of the lease.

4. Curtis and Atkinson during this time, in conjunction with others on the west, north, and east of these lands, erected thereon a continuous line of barbed-wire fences. Necessarily these fences traversed the school-fund sections as well as those of Phelps. Such as were on his land became his property under the terms of the lease at its expiration. The parts of fences on the State sections remained the property of Curtis and Atkinson or became that of the

State. For the purposes of this case it does not matter whether they belong either to Curtis and Atkinson or to the State.

5. Curtis and Atkinson remained on the land of the lessor after the expiration of their lease and were in law tenants either in renewal of their old lease or at the suffrance of the lessor; it matters not which.

6. During the time of their lease Curtis and Atkinson built *corrals* and other improvements on the land and made two artificial ponds, called "tanks," for furnishing water to their cattle. The proof shows that one of these "tanks" was on plaintiff's land. The exact location of the other was not determined.

7. June 12, 1887, Curtis and Atkinson made application to the proper authorities of Texas to lease all of the school-fund sections alternating with those leased by them of plaintiff, which was filed for action in due order and never withdrawn.

8. June 24, 1887, Curtis and Atkinson became hopelessly insolvent, and on that day Sam. Lazarus, the defendant, "purchased all the cattle and horses which they had on these lands, with all their interest in the inclosing fences and all their right to corrals and watering tanks and whatever other property they had in said inclosure."

9. After defendant purchased the stock and rights of Curtis and Atkinson negotiations were had between him and plaintiff's agent looking to the lease of plaintiff's land, but no agreement was reached.

10. Lazarus then, on September 12, 1887, leased the school-fund-land sections from the State for four years from

June 12, 1887, which was the date of the application of Curtis and Atkinson, to whom he succeeded. The bill of exceptions recites that "the said leases dated back to June 12, 1887, because at that date the said Curtis and Atkinson had applied for leases of said land, and the proper officer of the State, for some reason, required the leases to commence from said June 12, 1887." [We shall refer to these reasons on the argument.]

11. In addition to the cattle and horses purchased of Curtis and Atkinson, one B. C. Evans had three thousand five hundred head of cattle on said land, which defendant took care of and pastured for him until 1889, when he purchased them of Evans. For this care and pasturage Evans paid defendant five thousand dollars for the first year and for the remaining period to time of purchase one dollar and sixty-five cents per head, or $5,775. In addition to these, Curtis and Atkinson, in selling to defendant, had excepted 2,500 calves which had been sold to some other person. These defendant cared for and pastured until the spring of 1888 for their owners for the sum of $2,500. The total receipts for pasturage of other persons' cattle within two years amounted to the gross sum of $13,275 (Rec., p. 13). The jury found for plaintiff for the use of his lands by defendant for two and a half years the sum of only $8,417.

12. From the date of his occupancy to the time of the trial the cattle and horses owned by defendant and those controlled and cared for by him were more than sufficient to consume the grass on the lands of plaintiff and those leased by defendant from the State within the inclosure. The lands showed that they were overstocked in the summer of 1887 and so continued through 1887 and 1888.

13. As we have seen, these lands on the north, east, and west were fenced before defendant came into possession.

On the south there was a body of land owned by the Childress Land and Cattle Co., and the boundary was unfenced. In the summer of 1887 the Childress Land and Cattle Co. commenced a division fence, which was finished in the fall of the same year. This connected with the fences on the east and west and left the lands of plaintiff and the leased lands of defendant within a perfect and complete inclosure. The lands were thus exclusively grazed by the cattle belonging to defendant and those controlled and pastured by him for hire.

14. The defendant proved that he did not build any of the fences and they had never been kept up or repaired by his authority.

15. The undisputed proof, then, stands as follows:

On the 22d day of April, 1887, the plaintiff below and defendant in error here became the owner in fee simple of the lands described in the plaintiff's petition. The tenants of the plaintiff's vendor as his agents had, in conjunction with others, inclosed the plaintiff's lands from every approach save that of one, who might occupy the alternate sections of the public-school lands which had been included in the same inclosure (and very properly, since the same tenants sought to lease these lands, too); and except also on the south, where the Childress Land and Cattle Co. practically united with the tenants on the north, in one common inclosure until the fall of 1887, when the Childress company erected a fence all along the northern boundary of their own land and the southern boundary of plaintiff's (Rec., p. 11). It was stipulated in the contract of lease "that all permanent improvements erected upon said lands by said lessees during their term aforesaid should at the end of said term remain upon said leased lands and become the property of the lessor" (Rec., p. 11). The reversion in this property passed to the plaintiff by his purchase. The same

lessees (Curtis and Atkinson) "constructed within the inclosure aforesaid two tanks, one of which was upon a section of the land described in plaintiff's petition. There was no proof as to whether the other was upon the school sections or the sections belonging to the plaintiff" (*id.*, 12).

On the 22d of April, 1887, when the plaintiff below and defendant here became the owner in fee simple as aforesaid, Curtis and Atkinson had already become tenants holding over, and on June 24, 1887, the defendant in the court below, and plaintiff in error here, took the initial step toward occupying an identical position. He bought the cattle then upon the plaintiff's land and lawfully on no other. He bought the fences which were erected for the purpose of retaining the cattle on plaintiff's land, and preventing them from straying for any distance beyond it, together with "corrals and watering tanks" erected by the prior tenants, and so far as the same were on plaintiff's land reverting to him whenever the tenancy, *express or implied*, had expired. (*Id.*, 13.)

Prior to September, 1887, Lazarus had acquired no right to graze any other land than that belonging to the defendant in error. He had an implied leave and license to graze this, by paying therefor so much as should be justly due. "Negotiations were had after defendant bought the cattle and horses from Curtis and Atkinson between defendant and plaintiff's agents respecting a lease by defendant of the lands described in plaintiff's petition, but no agreement was reached between the parties as to the price to be paid plaintiff for lease of such lands" (*id*). In the presence of these undisputed facts the owner of the land decided to ask a court of justice to adjudicate the proper sum to be paid to him for the use of the pasturage, fences, corrals, and watering tanks, from which Lazarus realized so handsomely, not only on the cattle which he pastured for himself, but on the cattle which he pastured for others.

The petition alleges "*that the reasonable rental value of the*

grass of said lands per annum since the defendant has been in possession thereof amounts to, to wit, the sum of $15,000.00; *that by reason of the exclusive use and occupation of the said premises and the consumption of the grass thereon the said defendant has become liable and promised to pay plaintiff the reasonable value of the same.*" (*Id.*, 6.)

In a court where the common-law jurisdiction is retained this would be equivalent to an action of assumpsit for use and occupation. As such the court tried it; and as one method of determining the fact would be to ascertain whether or not the cattle and horses introduced into the inclosure were so numerous that they could not possibly be accommodated without using and occupying the plaintiff's land, the court instructed the jury, "If the defendant has kept said inclosure so overstocked, as plaintiff claims, *then the defendant is liable to the plaintiff for the value of the rent of plaintiff's lands, as you may find it to be from the proof. If, therefore, the proof satisfies you* that the defendant has kept in said inclosure such a number of stock as not only consumed all the pasturage on the lands he had leased from the State, but also *all* the grass on the lands of plaintiff, you will find for the plaintiff, and assess his damage at what you find from the proof to be *the reasonable value of the rent of plaintiff's said lands from the 24th day of June, 1887, until now*" (*id.*, 4); where obviously the word "damage" is used, not as the measure of trespass, but as the measure of appropriation and consequent indebtedness.

To this instruction, indeed, no exception was taken, and even if there were error in it the same would not be here for review. But the plaintiff in error complains that the court declined to give repeated instructions proffered by him purporting to announce the law of Texas in relation to fences and vagrant cattle. But surely this was no case of wandering cattle. If the cattle of Lazarus strayed at all, they rather strayed from the plaintiff's land than to it; from the place on which they were originally pastured, and lawfully

so, under contract with the plaintiff or his vendor. As the plaintiff did sue the defendant on a contract—not express indeed, but implied by law—the instruction that he did not was necessarily refused (*id.*, 8), and the fourth instruction asked by defendant, empowering the jury to find that there was "no satisfactory proof of the amount the plaintiff is entitled to recover and no proof of facts from which the jury can make any estimate" (*id.*, 9), was in the teeth of the proof, which "showed the rental value of plaintiff's land was from two to four cents per acre per annum during the years 1887, 1888, and 1889," and which the bill of exceptions certifies to have been "*undisputed*" (*id.*, 13). The larger rent would make the rent of 168,000 acres amount to $6,720, and the smaller rent, of course, to half as much per annum. To have given the instruction asked would have been to authorize the jury to find against the undisputed proof—the most unmitigated error the court could well commit. (*Kelly* vs. *Jackson*, 6 Pet., p. 631.)

In the single assignment of error now urged by the plaintiff in error he seeks to review the instruction, which the court did give, as to the liability of the plaintiff in error for the use and occupation of the land of the defendant in error (but to which at the time no exception was taken), and, further, to submit for consideration what must be intended as a summary of the first and second rejected instructions, viz., the error of the court in refusing to charge the jury "that the plaintiff in error was not so liable unless it was shown that the defendant in error had fenced his land from the land leased by the plaintiff." He is evidently of the opinion that he has a sovereign shelter for any act of trespass he may commit, and hence his desire to turn the case at bar into the kind of action for which he has this certain refuge. The assignment of this alleged error should be; that the circuit court was unable, at the bidding of Lazarus, to change the real cause of action into the one which Lazarus preferred.

The court, upon the assumption that the jury might find from the facts, that defendant had by his acts practically turned or herded his cattle on plaintiff's land (as he did actually, and exclusively, in the beginning), knowing that they would and intending that they should consume all the grass thereon, charged the jury as heretofore stated.

No exception was taken to the form of this charge, and no special instruction was asked by defendant in amplification or amendment thereof, upon the general view of the law as therein stated. The special instruction asked and refused stated the broad issue in opposition thereto, that plaintiff could not recover because his lands were unprotected by fences.

The brief of plaintiff in error indulges in some criticism upon this instruction of the court, as assuming that the lands were actually inclosed by defendant. The charge is not subject to such interpretation. If it were, counsel should have objected to it on that ground or presented a more specific instruction. The court did not assume that the land had been fenced by defendant, but left it to the jury to say, whether or not the defendant had not actually consumed all of the grass upon the plaintiff's land as well as that upon his own. It is not the case assumed by the defendant, of a man within an inclosure wholly made by others having only cattle enough to consume his own grass, and yet which may, if unrestrained, also stray upon and consume some of the grass of adjoining owners. Had such been the case, doubtless no suit would ever have been instituted.

Unquestionably, when defendant purchased the cattle, property, and privileges of Curtis and Atkinson he became, by irresistible implication, a holding-over tenant, as they were. Otherwise he would have been a naked trespasser upon the lands of the State, by any use he might make of them.

He made use of the corrals and also of the water tank, which latter was certainly upon the plaintiff's land. The

cattle on the land, or under his control, were more than sufficient to consume all of the grass upon all of the lands. They were what is called "overstocked."

For this very reason, no doubt, the Childress Land and Cattle Company fenced the boundary between them and defendant to prevent his cattle on these "overstocked" lands from eating its grass also.

Defendant at first contemplated leasing from plaintiff, but finally refused. He knew that, under the law in force, he would be compelled either to lease the lands from the State regularly, or pay the charge from time to time to the State collector as a tenant at will, or subject himself to prosecution and fine at the rate of $100 per section, which would be about fifteen cents per acre. The idea seems then to have occurred to him, that the common law as to trespass upon unfenced land did not prevail in Texas, and that its policy of extremely careful regard for the rights of property had been substituted by one, tending to place the men who owned lands and paid the taxes on them, at the mercy of those rapacious enough to know no restraint but the plain prohibitory letter of the law.

This explains the act of Lazarus going to the State authorities and having his lease relate back to the date of Curtis and Atkinson's application. The officers of the State had no cause to object, because Curtis and Atkinson had failed and defendant had succeeded them, and the State received the benefit of the revenue from the earliest date; but Lazarus, by so doing, relieved himself from liability as a trespasser and violator of the lease laws from June 24 to September 12, 1887, and also sought to legalize his occupation of plaintiff's land under this cover as a lessee of the State from June 12, 1887, a date twelve days prior to his possession. Whatever effect this act of antedating had upon his rights, so far as the State is concerned, it could not possibly relate back to and justify his occupation of plaintiff's land on June 24, 1887, as a mere rover from

adjacent land to which at the time Lazarus had no title whatever.

Mr. Lazarus may prove as a fact that he has not kept up or repaired the fences about the land; but he cannot escape the presumption of law arising from his ownership of these fences. By purchase from Curtis and Atkinson he owned whatever right they had in the fences built by them on the State sections. By the lease of the State lands he took whatever interest the State had in the fences so far as built upon its lands.

However this may be, by the junction of the two interests he became the owner of the fence on those sections, at least, to the end of the State's lease to him. Doubtless they did not need repair, or if they did, his lands being overstocked, he was presumably willing that the fences should fall to ruin in order that his cattle might then depredate across his boundaries on his neighbor's. This is doubtless the reason why these neighbors repaired the fences, as he claims they did, and why the Childress Land and Cattle Company commenced their fence about the time that he came on the lands, and finished it up before fall, so as to protect their fall and winter range from his cattle also. Being the purchaser and lessor of these fences, he is responsible for their effect as if he had built them. Knowing that others repaired and kept up his fences, he is responsible for the fact of their continued existence.

Defendant offers no justification of his use of the corrals and of the water tanks. The latter are an absolute necessity to the maintenance of stock in these large inclosures, and, in fact, the former may be so considered also. He simply plants himself upon the proposition that he is owner for a time of the State's lands; that he has turned loose a lot of cattle thereon which, restrained by the fences, graze the land within the inclosure and consume plaintiff's grass because plaintiff does not fence up each of his sections and protect himself from their depredations.

He naively says, "I have not excluded plaintiff from the land." "Others have fenced him off." "I have no objection to his turning cattle on his own lands." "I offer no obstruction thereto;" when the lands had already been stocked beyond their proper capacity and the grass consumed by his own cattle. No one knew better than he that plaintiff could not, as a sane man, drive in cattle to their certain destruction, and that he could not undertake the expense or the absurdity of fencing separately nearly three hundred sections of land. Moreover, the defendant was not content with grazing his own cattle only, but he "cared for and pastured" the cattle of others for hire. In two years he received for "caring for and pasturing" these cattle the gross sum of $13,275. He was thus engaged in making profit of plaintiff's lands and is resisting the judgment of $8,417 for two and a half years of his thrifty occupation. He could pay this judgment and still have $5,000 profit. Had he not purchased Evans' cattle at the expiration of two years he would have continued to receive the five thousand dollars per annum for their pasturage alone.

It is not, however, the great amount of these receipts for pasturage of others' cattle that affects this case. The pertinent and important, if not controlling, fact is that he took others' cattle to "care for" as well as pasture upon plaintiff's land. He was, as bailee of these cattle for hire, bound to use all reasonable endeavor, not only to see that they were supplied with sufficient grass, but also that they were not allowed to escape or to be carried off by others.

In fact, if the land had not been inclosed so as to restrain these cattle, they never would have been entrusted to him, and he would not have received any consideration for their pasturage. The very fact that he charged for their pasturage presupposes the existence of inclosing fences by which the cattle would be prevented from ranging the entire country, as they otherwise would have done. If the fences had not been there these people could as easily as Lazarus

have turned their cattle on the land without paying him for the privilege. It was for such purposes especially that water tanks, corrals, and fences, and the permanent improvements of a ranch were very important and, in fact, indispensable. This occupation of defendant, as an *agister*, effectually exposes the sham pretense, that he did not deliberately enter upon plaintiff's land and appropriate the grass thereon, and that he only obtained a mere incidental benefit, excused by law by reason of the fact that he owned cattle on his own adjacent lands, which, after the ordinary habit of the creatures, would rove and graze plaintiff's unfenced lands also without special intention on his part that they should do so.

II.

It may not be without value to concisely group the land laws and fence laws of Texas bearing on this subject and sought to be utilized by the plaintiff in error:

Land Acts.

Act of April 17, 1879, Laws of 1879, Regular Session, p. 101.

Whereas many persons in this State have inclosed a large portion of the public free-school lands, and have thus severed them from the public common, and are using them for pasturage to the exclusion of all others, thereby giving just cause of complaint: Therefore, &c.

Section 1. That each and every person who shall have inclosed by fencing or otherwise any of the public free-school land belonging to the State and shall use the same to the exclusion of the public shall pay an annual rental value therefor of the sum of $25 for each section so inclosed.

It will be noted that this section relates to inclosure "by fencing or otherwise." This "otherwise" must allude to the practice of cutting off cattle from going beyond a certain

limit to the south by what is called a "drift fence." This is a single line across a territory, barring further passage towards the south or southeast, the natural direction in cattle "drift" before the winter "northers."

Section 2 makes it the duty of the surveyor of each county to report to the county commissioners' court on the first Monday in June yearly the number of sections inclosed during the past year and the names of the persons controlling the same, &c.

Section 3 provides that the said court shall record a copy of the list and forward one to the comptroller and deliver one to the county tax-collector.

Sections 4 and 5 provide for collection by collector.

Section 6 is quoted in the first pages of the brief. (P. 4.)

2. Act of April 13, 1883, provides for leasing lands generally for terms not to exceed ten years. (Acts 1883, p. 89, sec. 16.)

3. Act of April 1, 1887—took effect July 4, 1887—amends the land sales and lease laws. Article 4052, Sayles' Texas Civil Statutes, provides how leases shall be made and contains provisions for sale of leased lands to settlers and, to cover case of purchasers in pastures under lease, contains this *proviso*: "*Provided further*, That no actual settler who shall purchase land within any leasehold shall be permitted to turn loose more than one head of cattle or horses for every ten acres of land purchased by him and uninclosed, or in lieu thereof four head of sheep or goats to every ten acres of land so purchased and uninclosed."

Each violation of the provisions of this act which restricts the number of stock that may be turned loose on lands leased from the State shall be an offence, and the offender on conviction shall be punished by fine of not less than one dollar for each head of stock he may so turn loose, and each thirty days' violation of the provisions of this section shall constitute a separate offense.

4. Article 4055, Sayles' Texas Civil Statutes, same act of April–July, 1887, reads:

"It shall be unlawful for any person to fence, use, occupy, or appropriate by herding or line riding any portion of the public lands of the State, or of the lands belonging to any particular fund specified in this act, without having first

obtained a lease of such lands in accordance with the provisions of this act. Any person, whether owner of stock, manager, employee, or servant, who shall fence, use, occupy, or appropriate, by herding or line riding, any portion of such lands without a lease thereof, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than $100 nor more than $1,000, and, in addition thereto, shall be imprisoned in the county jail for a period of not less than three months nor more than two years. Each day of such fencing, using, occupying, or appropriating, by herding or line riding, shall be deemed a separate offence, and any person so offending may be prosecuted, by indictment or information, in the proper court of the county where any portion of the land lies or to which it may be attached for judicial purposes, or in the county of Travis [the capital is in this county], and jurisdiction of such offences is hereby vested in said courts; and in case any indictment or information is preferred or filed against a non-resident of this State for a violation of this section, it shall be the duty of the governor to demand the extradition of the defendants from the proper officer of any State or Territory where he may be found in order that he may be brought to trial. 'Fencing,' within the meaning of this act, is the erection of any structure of wood, wire, or both, or any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats, or hogs, whether the same shall inclose lands on all sides or be erected on one or more sides. Any appropriation of land belonging to any particular fund specified in this act, or of the public lands of this State, without first having obtained a lease thereof, by fencing of any kind, or by inclosures consisting partly of fencing and partly of natural obstacles, or impediments to the passage of live stock, shall be deemed an unlawful appropriation, punishable as provided in this section for appropriating such lands, and each day said land is so appropriated shall be deemed a separate offense."

Fences.

FEBRUARY 5, 1840.

1. Sayles' Texas Statutes, article 2431, defines the sufficient fence.

Article 2432 provides for renewing the fence and injury

done and provides for assessment of damages by a freeholder summoned by the J. P.

Article 2433 provides for impounding stock where there is a lawful fence upon the second trespass committed.

Article 2434. Owner not liable for damages if the fence is insufficient.

Article 2435. Persons who have insufficient fences prohibited, under penalty, from killing, wounding, &c., stock on lands.

2. Article 2435*a* (act of February 6, 1884) provides for an unlocked gate every three miles in pasture fences. (This evidently to give mode of travel through the county.)

3. Article 2435*b* (act of July 4, 1887):

§ 1 prohibits removal of division fences by one joint owner.

§ 2 provides for withdrawal after 6 months' notice.

§ 3. Penalty for continuing to join after other has removed or disconnected lawfully.

Amended slightly April 6, 1889.

Not relating to anything substantial.

Changes penalty and adds to 3d section.

The act of March–June, 1891, provides that having fences around a large tract, within which another's land lies, shall not be peaceable and adverse possession, so as to give title by prescription. (Gen. Laws 1891, p. 71.)

It is the duty of one taking cattle to pasture to keep his fences in repair, to make it a reasonably safe inclosure for the cattle.

McAuley *vs.* Harris, 71 Tx., *page* 640.

All the cases in States where the common-law rule as to trespass by cattle upon unfenced lands has been intimated or held to be inconsistent with the conditions of the country and habits of the people, etc., agree in holding (as we shall hereafter see) with the court of appeals of Texas, that the exception does not extend so far as to give a right to drive cattle upon the lands of another for grazing.

Without regard to the fact that defendant took the cattle of others to pasture, in contemplation of law the defendant Lazarus actually drove or herded his cattle on plaintiff's

land. The rule of protection, as we read the decisions, covers only the case where cattle by the owner's negligence, or failure to inclose or herd them, stray upon the lands of another in a natural manner, without any purpose on their owner's part to do damage or appropriate another's property. The fence statutes or the rule of the common law as changed by circumstances might well be held to give immunity against an action of trespass, where cattle merely strayed, without the express intention of the owner, on the lands of another, but not to entitle the owner of the cattle to take virtual possession of and use the lands.

To say that one must actually drive his cattle onto the lands of another and herd them thereon before that other would have a right of action is to overstep the reason which gave birth to the exception to the rule of the common law and infringe without excuse upon rights of property. If one should own or lease a tract of land confessedly, as in this case, too small to maintain his cattle, and yet drive them thereon and turn them loose, knowing that they must necessarily, in order to live, invade the lands of his neighbor and consume his pasturage, certainly the effect would be the same, as if he were actually to drive them upon the neighbor's land and herd them there for the same purpose.

Suppose a man should buy or lease a section of 640 acres of land, and drive a thousand or even one hundred head of cattle on it. It could hardly be claimed that he had not intentionally appropriated the lands of his neighbor, when he was bound to know that the cattle could not possibly exist, for even a short period of time, on the small tract of land owned and controlled by him. A man is conclusively presumed in law to intend the reasonable consequences of his own deliberate acts. To say that the depredations of cattle under such circumstances were the result of a casual wandering or straying upon land is to trifle with terms as well as with the sacred rights of property.

Can any one read this evidence and believe that Lazarus

did not with deliberate calculation take possession of plaintiff's land, and pasture his cattle and those of others for hire upon it and make profit of plaintiff's grass, and now proposes to defraud him of the value thereof? Do rules of law and courts of justice exist for the purpose of shielding such wrongs, of legitimating such violations of the rights of property?

The doctrine contended for here is directly supported by cases decided by the very courts which have held that, owing to the peculiar conditions of the country, the common-law rule as to trespass was not in force, as we shall now see.

In the States where these cases have been decided—say, in Ohio, Illinois, Kansas, Iowa, Colorado, and California—it has been said that the common law was not in force by statutory command, and that, being inapplicable to the situation, customs, and habits of the early settlers of the country, it would not be applied; but in each they were forced to limit the exception which they established to the common-law rule to the narrowest possible ground, else they would have put themselves in the attitude of taking private property from its owners.

Kerwhacker *vs.* C., C. & C. R. R. Co., 3 Ohio St., 172, is a leading case on this question and as such is cited and quoted freely from in the case of Buford *vs.* Houtz (133 U. S., 320), which case we shall refer to later.

In an elaborate opinion the court, after expressly holding that the common law had never been adopted in Ohio (see page 177), concluded that this rule as to the trespass of cattle upon uninclosed lands was not suited to the conditions and customs then prevailing in that State, but added, significantly, as if intending to guard against just such a state of affairs as the case at bar discloses—

"The right to allow animals, inoffensive in their habits, to run at large does not imply a right of the owner to keep his creatures upon another's uninclosed land against his consent (p. 183)."

In Illinois, when the question arose in another form, the court had to say that the majority of the court had gone too far in the case of Sealey *vs.* Peters, 5 Gillman, 130. They had to distinguish between that case and another line of cases, where, in actions for killing cattle straying upon unfenced railway tracks, they had been compelled to hold, that the owner of land owed no duty to cattle trespassing thereon to see that they were not injured.

In Headen *vs.* Rust, 39 Illinois, 186, the two lines of cases were discussed and the distinction drawn, and the court had to admit that stock straying upon another's land were "technically trespassers."

In Kansas, where the fence laws were comprehensive and plain, the same rule has been announced. In U. P. R. R. Co. *vs.* Rollins, 5 Kansas, 167, it was said that the mere fact that fence laws exist or laws regulating the running of stock at large, &c., does not confer a right to invade the land of another. They impliedly authorize cattle to run at large and relieve the owner from damages for injuries done by them while wandering or straying at large, but they do not expressly authorize them to run at large upon others' lands. They have no legal right to be on the land of another; the owner is simply protected if they do damage while there.

We suppose it will hardly be contended that a statute giving an owner the right to invade another's land simply because he had not fenced it would be within the power of any legislature. The owner "has not thereby lifted up the wrongs and trespasses of others upon his own rights, to be moral virtues, or legal rights to be protected and encouraged by law, as seems to be supposed" (*Id.*, *p. 178). "There is no statute that gives or attempts to give to any person any rights upon another's land, whether it is fenced or not. *A statute of that kind would tend to disturb vested rights and be unconstitutional and void.*" (*Id.*, *p. 176.)

In the case of Davis *vs.* Davis, 70 Texas, 123, the court said with respect to the statute regulating fences that it was

not intended to make a rule for the purpose of regulating the rights of adjoining owners with respect to trespassing live stock:

"The object of the statute was to afford an easy remedy for trespass by live stock to such land-owners as complied with its provisions, but was not to throw open to the use of the public the land of all proprietors who did not observe the statutory requirements in making or maintaining these inclosures. We are not prepared to say that the legislature had the power to make all private lands in the State, when not inclosed in a particular manner, common grazing ground if it had so desired. Similar laws in other States have been held to confer upon owners of trespassing castle immunity from a suit for damages done by them when the inclosure is not such as the law requires, but not to confer any right to the use of the land."

In Caulkins *vs.* Matthews, 5 Kansas, 191, the plaintiff sued the owner of land for damages for the loss of his horse, which, while grazing thereon, fell into a concealed well. The court below held that he had a right to recover on the ground that as the plaintiff had the right to let his horse graze upon defendant's land there was a correlative duty upon the part of the defendant to exercise care, so that the animal should not be hurt. The judgment was reversed upon the doctrine of U. P. R. R. Co. *vs.* Collins, *supra*. "This case, as that, was tried upon the erroneous theory that the plaintiff had a *right* to pasture his horse upon the uninclosed lands of the defendant." (5 Kansas, *p. 199.)

In Larkin *vs.* Taylor, 5 Kansas, 433, the court said, speaking of the inclosure laws:

"The object of the law of inclosures is to permit stock to run at large and graze on the prairie, and relieve the owners thereof from an action for damages, should they wander upon the lands of another unprotected by a lawful fence. It is not to protect a wanton trespasser, or a man who shows rather an intention to injure his neighbor than to enjoy the benefits the law allows him. Such conduct would not

be negligence or carelessness in the ordinary acceptation of those terms. It would not be a mere harmless inattention, but a willful or wanton trespass, not intended to be protected by our fence laws" (page 446). (See also Melody *vs.* Reab, 4 Mass., 471; Powers *vs.* Kindt, 13 Kansas, 74; De Lancy *vs.* Erickson, 11 Nebraska, 533.)

In the last case the court held that while the common-law rule did not prevail, still an owner was not required to fence against intrusion; that the owner was not entitled to recover in trespass when the animals wander upon the land, but that the rule is different where they are driven upon the land without the owner's permission. This case is cited with approval in a case in Iowa (Otis *vs.* Morgan, 61 Iowa, 712), in which the plaintiff had a part of his land inclosed by improper fences. The defendant drove his cattle on the uninclosed land and they broke through the fence and injured the plaintiff's crops. The court held that the plaintiff was entitled to no protection against wandering cattle, because his fence was clearly not such a fence as the statute required. But the judgment was sustained on the ground that although the common-law rule was not in force in that State, yet that exception only applied in cases where the cattle in roaming the prairies wandered on another's land, not where they were driven or kept there.

In Colorado it has been held (Morris *vs.* Fraker, 5 Colorado, 425) that the common-law rule did not apply. But in Willard *vs.* Mathesus, 7 Colorado, 76, it was found necessary to limit the doctrine. In that case the defendant's sheep were being grazed under herd. They went upon defendant's land and through his fence, which was built against cattle only, and did not prevent the entrance of sheep damaging his crops. The court held defendant liable. Referring to Morris *vs.* Fraker, the court said that case "is based largely upon the general custom that has always prevailed among stockmen in this country of allowing their cattle to roam at will upon the public domain."

It then proceeds to draw a distinction between cattle roaming at will, and sheep wandering the country in charge of a herder. The decision could not be based upon the ground that the sheep were driven on the field, for they were not, and it therefore went upon the ground of negligence of the herder; but we submit that if one has a right to let his animals run at will over uninclosed lands of others he is under no obligation to see that they do not depredate thereon, even though he may have agents present who could prevent their doing so.

The truth is that the country has undergone a vast change since the earlier decisions, and some of the courts are fast to perceive it, and the tendency is back to the sound rule of the common law, pursuant to the change in public policy. For example, look at Texas where this case arose. The public lands had been grazed for years until the great cattle-owners, like Lazarus, began to claim "free grass" as a right of property by prescription. But public policy was made to change, and the lands formerly grazed over freely must, since the 17th day of April 1879, be leased under severe penalties. Cattle have ceased to roam the prairies at will. They are now covered into great pastures where artificial ponds called tanks provide the water they used to wander many miles to find in times of ordinary drought, and where *corrals* afford facilities for marking and branding and separating the beeves or those gathered for market, as well as for attending to those pastured and cared for for hire.

The plaintiff in error, very erroneously, we think, relies upon a recent case in Texas. (Pace *vs.* Potter, 85 Texas, 473.) The facts of this case are quite different from those of the case at bar. The Kit Carter Cattle Company owned a large body of land. Plaintiff owned nine sections immediately west thereof. Other persons owning lands adjoining those of the plaintiff and the Kit Carter Cattle Company fenced them, thus throwing their lands in one common inclosure. Neither plaintiff nor the said cattle company built any of

the fence or owned any interest in it, save that the cattle company owned a half interest in about a mile of fence on the south side of a part of their lands, which, to the amount of 41,000 acres, they afterwards sold to Pace, the defendant. The Kit Carter Cattle Company grazed all the lands in the inclosure, including plaintiff's, until about July, 1888, when they built fences north and south along the 41,000-acre tract sold to defendant, thus leaving said tract and plaintiff's 5,860 acres in one inclosure. From July, 1888, until March, 1889, defendant's cattle roamed over all the land, but at this time he built a fence, separating his land from plaintiff's. The suit was brought for the rental value of the land for the time between July, 1888, and March, 1889. There was no evidence whatever tending to show that defendant overstocked the pasture or unnecessarily consumed the grass on plaintiff's land. There is positively no evidence of bad faith on defendant's part; on the contrary, it appears that within eight months he, at his own expense, fenced off plaintiff's land so that his cattle could not even stray upon it. It appears, therefore, that the only use of plaintiff's land was by reason of the straying or wandering of defendant's cattle thereon because there was at first no dividing fence. It is upon this view that the case was argued and decided. The court, after stating the facts, says:

"It is not contended that the rule of the common law, making it the duty of the owner of cattle to confine them to his own land and holding him liable for trespass committed by them upon the uninclosed land of another, was ever in force in this State. It is inapplicable to our situation and the customs and habits of the early settlers of the country and inconsistent with our legislation in regard to fences and stock." (Rev. Stat., titles 43 and 93; Railway Co. *vs.* Johnson, 65 Tex., 389; Buford *vs.* Houtz, 133 U. S., 320; 7 Am. & Eng. Encyclopædia of Law, 889.)

The court then proceeds:

"Under the proof we are of the opinion that plaintiff's land must be treated as having been unfenced with respect to the cattle belonging to the defendant."

This was to say that the fencing in was the result of other acts long before defendant's rights accrued, and the court adverted to the fact that defendant, without compulsion of law, actually fenced so as to protect plaintiff's lands from his own cattle.

In conclusion the court said:

"The defendant would have been liable to the plaintiff if he had taken exclusive possession of the lands inclosed. If the court of civil appeals had found as a fact that such exclusive possession was taken, we would be bound by it. The court does find, as a conclusion of law, that such exclusive possession was taken by defendant, but neither from the conclusions of fact in their original opinion, nor in the statement of the evidence in their opinion rendered on the motion for a rehearing, is there anything which, in our opinion, sustains such conclusion of law."

We think it clear from this that if there had been proof to show that defendant's cattle were sufficient in number to require all the grass upon plaintiff's lands as well as his own for their maintenance, it would have constituted the "exclusive possession of the land" for which the court say he would have been liable. How else, in the situation as shown by the facts of the case, could the defendant have "taken exclusive possession" of plaintiff's lands?

The court of civil appeals concluded as a presumption of law that defendant had this exclusive possession, because plaintiff's land, without any act of defendant, was in fact fenced off from all adjoining owners except defendant. This fact alone the supreme court held not to be conclusive of exclusive possession by defendant. We are supported in our view of the effect and meaning of this opinion by the

cases cited by the court to sustain its view of the application of the common law.

Railway Co. *vs.* Johnson, 65 Tex., 389.

In this case it was held that one claiming a mere grazing right in lands, acquired by sufferance of the owner or by license as claimed, did not have a right to recover damages for injuries to the land by flooding it and destroying the grass, etc. The court said:

"A mere license to graze would not confer such right in the lands as would pass to the appellee any part of the owner's right to recover for the damages done to the land. Certainly no more than a license is averred and even less is proved."

The court did say also:

"Since the fence law of 1840 the owner of uninclosed land has no right of action for the intrusion of stock upon it. The owner has constructive possession of his land, and that possession continues until there is an actual disseizin by adverse occupancy or use. The grazing of cattle which strolled upon it is not such use."

These remarks were clearly *obiter;* but in their expression it will be observed the court was careful to limit it to cattle which "strolled" upon the land.

The actual case was this: A cattle-owner whose cattle grazed the land of another deliberately brought suit for damages against a railway company whose embankments at a time of flood caused water to run over the land and injure the grass of the other, to which he had no title.

The plaintiff in that case was something like Lazarus. He was trying to make profit out of the grass which belonged to another. In Buford *vs.* Houtz, 133 U. S., 320, a suit in equity was brought by Buford, Crocker, and others, who owned certain alternate sections within the Central Pacific reservation in Utah, to exclude defendant, whose

sheep were grazing upon same. The case is very different from the case at bar. On page 325 the court states the issue therein as follows:

"The appellants, being stock-raisers like the defendant, whose stock was raised and fattened on the unoccupied public lands of the United States mainly, seek by the purchase and ownership of parts of these lands, detached from a large body of the public domain, to exclude the defendant from the use of this public domain while they themselves appropriate all of it to their own exclusive use. This they propose to do without an act of Congress or of any legislative body whatever, but by means of this bill in chancery, obtaining an injunction against the defendants, whom they allege to be the owners of two hundred thousand head of sheep grazing upon these public lands, which shall exclude defendants from the use of them and thereby secure to themselves the exclusive right to pasture their twenty thousand head of cattle upon the same lands."

The court proceeded further to say, that it was evidently an attempt upon the part of these parties to obtain exclusive use of the lands of the United States, and exclude others who had as much right thereon as they. It is true, the court says, that the custom of the country is in favor of protecting the unlimited use of the public lands to all persons, and that in using them incidentally the land of adjacent owners may be trespassed on by straying cattle or sheep.

The opinion concludes in these words:

"Upon the whole, we see no equity in the relief sought by the appellants in this case, which undertakes to deprive the defendants of this recognized right to permit their cattle to run at large over the lands of the United States and feed upon the grasses found upon them, while upon pretence of owning a small portion of the land which is the subject of controversy they themselves obtain a monopoly of this valuable privilege."

The plaintiffs in that case really occupy the same position that Lazarus does here. Probably, if other persons had brought cattle into the inclosure occupied by Lazarus and turned them loose upon the lands of plaintiff and the lands which Lazarus had leased from the State of Texas, he would have undertaken to exercise the same right of ownership, and had he appealed to a court of equity for an injunction he would have been in identically the position of the complainants in the case of Buford *vs.* Houtz, as stated by the court in its opinion.

We have argued this case upon the admission that the common-law rule with respect to trespassing cattle upon uninclosed lands does not prevail in the State of Texas. It is true that this was held in the case in 85th Texas, but, as said by Judge Cooley with respect to the cases to the same effect in the Western States generally, "it can scarcely be said that the point has been distinctly ruled" (Cooley on Torts, 2d edition, 397). In the case in 85th Texas it was conceded by counsel, as stated by the court, that the common law was not in force in Texas. The court and counsel overlooked a fact that must necessarily have had weight if it had been called to their attention, because it creates an important difference between Texas and the other States mentioned with respect to the question.

The courts of California could excuse the non-enforcement of the common law because the custom of permitting cattle to roam the country had prevailed in California long before the cession of her territory, and the civil, not the common, law was the foundation of her laws, as it was originally also in Texas; but in Texas the constitution of the Republic of 1836 (art. IV, sec. 13) provides: "That the Congress shall, as early as practicable, introduce by statute the common law of England, with such modifications as our circumstances, in their judgment, may require, and in all criminal cases the common law shall be the rule of decision." On January 20, 1840, the Congress, under this injunction,

enacted that "the common law of England, so far as it is not inconsistent with the constitution and laws of this State, shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature."

There was no statute like this to bind the courts of California, Ohio, Illinois, Kansas, Colorado, Nebraska, or Iowa.

Clearly, then, the "fence laws" in the brief of plaintiff in error do not contain this case. To a certain extent they do amend or repeal the common law, but, like all other statutes changing the common law, they must be strictly construed—that is, confined to their terms and not extended, save by implication that is plain and unavoidable. The decision in 85th Texas was without reference to this peculiar condition existing by reason of the adoption of the common law by constitutional provision and statute, a fact most proper to be considered in determining its effect, if it had the relevancy to the case at bar which the plaintiff in error supposes; but, in any event, the exception to the rule of the common law should be confined to a case where such trespass has been committed, without the purpose or intent of the owner, by cattle which, in fact, strayed or roved, by their own casual promptings and not by the premeditation of their owners, upon the lands of the plaintiff.

So much may be properly said to show the inapplicability of the law relied upon by the plaintiff in error to vindicate his performances, even if he had been sued in that action of trespass, of which he seems so covetous. In point of fact, however, no such action was brought, but an action for use and occupation, wherein the petition, the proof, and the rulings of the court concur. The case is one which pre-eminently invokes the equities of assumpsit and need borrow no aid from the penalties of trespass.

LEAKE, HENRY & REEVES,
LEIGH ROBINSON,
For Defendant in Error.

FILED.
JAN 25 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

No. 225.

SAM. LAZARUS, PLAINTIFF IN ERROR,

vs.

WILLIAM WALTER PHELPS, DEFENDANT IN ERROR.

Additional Authorities.

The constitution of the Republic of Texas (1836), article IV, section 13, provides—

"*That the Congress shall, as early as practicable, introduce by statute the common law of England, with such modifications as our circumstances in their judgment may require, and in all criminal cases the common law shall be the rule of decision.*"

On January 20, 1840, the Congress under this injunction enacted that—

"*The common law of England, so far as it is not inconsistent with the constitution and laws of this State, shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature.*"

Assumpsit for use and occupation of land by permission of the plaintiff lies on an implied as well as an express promise. (*Sutton* vs. *Mandeville*, 1 Munf., 409.)

"The action of assumpsit on *quantum meruit* lies at common law." (*Henwood* vs. *Cheeseman*, 3 S. & R., 503.)

"An action for use and occupation lies where the holding is upon an implied as well as an express permission of the landlord. A tenant who, after the expiration of and payment of rent under a parol demise, continues in possession, without any new agreement with the landlord, cannot, in an action against him for the use and occupation of the premises subsequent to the expiration of the former term, dispute the title of the plaintiff, and his subsequent holding will be deemed to have been by the implied permission of the original lessor." (*Osgood* vs. *Dewey*, 13 Johns., 240.)

"Assumpsit is maintainable at common law for the use and occupation of lands or tenements, although no express contract or promise; a promise to pay being implied." (*Logan* vs. *Lewis*, 7 J. J. Marshall, 3.)

"It is said, in some elementary books, that a statute of George II gave the action of assumpsit for use and occupation, and that the common law allowed no such remedy. This is a mistake, although it seems to have been sanctioned by the loose *dicta* of some judges. * * * If an action could not have been brought on an express contract for rent, in consequence of the application to it of the statute of frauds, was there no remedy at common law? Surely there was, because there was still a legal liability. * * * When there was no express contract of lease a promise might have been implied and assumpsit maintained" (Robertson, C. J., *id.*, pp. 4 and 5). "He occupied without molestation and it must be taken that it was with the assent of the grantee." (*Id.*, 6.)

"It is true that the statute of 11 Geo. II, c. 19, § 14, enacted that the action might be sustained when a demise has been proved, but the action existed before the statute was enacted, and the only effect of the statute was to enlarge its sphere. Privity of contract is doubtless essential in all cases. But when the defendant has entered and occupied by permission of the plaintiff, without any express contract, the law implies a promise on his part to make compensation or pay a reasonable rent for his occupation. In

such a case the consent of the owner to the defendant's entry, followed by such entry and by subsequent occupation, may be considered equivalent to a demise or at least *prima facie* evidence of a demise. *This is because a demise, with a corresponding agreement to pay rent or make compensation for the use of the property, is consistent with an unexplained entry by the owner's consent, and because it is a reasonable presumption that occupation thus taken was intended to be paid for.*" (Strong, J., in *Carpenter* vs. *U. S.*, 17 Wall., 493.)

"If a party continues to occupy and use premises, after being notified by the owner that if he does so he will be expected to pay rent, the occupant will thereby become liable to the owner for the use and occupation" (*Illinois Central R. R. Co.* vs. *Thompson*, 116 Ill., 159). This "does not seem to be controverted, and, indeed, could not be under repeated decisions of this court." (*Id.*, 162.)

"*Where party holds over after time expires, with notice that new terms will be required, his assent will be presumed.* Where a party, who had leased a part of a dock yard, was notified by the owner before the expiration of his term that he could have the same no longer, unless he took the entire premises and paid a certain price per foot frontage as rent, and the tenant held over and occasionally did use the entire premises, but objected to the new terms sought to be imposed: *held* that by remaining for another year after such notice, notwithstanding his objection, he became liable to pay for the whole premises, according to the new terms imposed, and that it would be presumed he finally acceded to them." (*Griffin* vs. *Kinsely*, 75 *id.*, 412.)

"Where possession is taken by one with the permission or assent of the owner, from such possession the relation of landlord and tenant is implied, as well as a promise to pay rent." (Wood on Landlord and Tenant, p. 13.)

"One who goes into possession of land as a mere 'squatter' holds as tenant at will of the true owners." (*Gay* vs. *Mitchell*, 35 Ga., 139.)

"The entry upon lands under or by consent of the legal owner or of one of several tenants in common is as to such

entry a tenancy" (*Wood* vs. *Drouthett*, 44 Tex., 366). "The owner may claim that the occupant holds as his tenant, although there has been neither a written nor parol contract to this effect. If one has assumed the rights of a tenant the owner may so treat him, and, though there is no contract between them, he will be estopped from denying the tenancy, and it is by no means true that the payment of rent or other consideration is necessary to impress upon the occupant of land the character of a tenant." (*Id.*, 371.)

This is repeated and reaffirmed by the supreme court of Texas in 1883, the court adding:

"Although these remarks refer to the owner and the occupant of land, they are equally applicable to the case before us, for we must suppose that S., the preceding tenant, acted in good faith towards his landlords, and that Francis could not have obtained the possession without an agreement to become their tenant." (*Towery* vs. *Henderson*, 60 Tex., 296.)

From the permissive occupation of premises, prior to or pending the execution of a lease, the relation of landlord and tenant will be implied, even though the tenant afterwards refuse to execute the lease. (*Dunne* vs. *Trustees*, 39 Ill., 578.)

"After the expiration of a lease for a year, if the tenant holds over, the law considers him responsible to his landlord, as on a hiring for another year, upon the same terms as before." (*Bacon* vs. *Brown*, 9 Conn., 338.)

"Where one enters into possession of vacant demised premises by the consent or permission of the tenant, he will be considered, in respect of the landlord's rights, as substituted in the place of the tenant, although he disclaim all privity with the tenant." (*Howard* vs. *Ellis*, 4 Sandford, 369; *Benson* vs. *Bolles*, 8 Wend., 175; *Jackson* vs. *Miller*, 6 *id.*, 229.)

The holding-over tenant may be treated as continuing the tenancy at the option of the landlord.

"The law fixes the tenant's liability for holding over independent of his intention. The legal presumption of a renewal from the holding over cannot be rebutted by proof of a contrary intention on the part of the tenant." (*Clinton, &c., Co.* vs. *Gardner*, 99 Ill., 151.)

But—

"The tenant has no such election." (*Conway* vs. *Starkweather*, 1 Denio, 113; *Vrooman* vs. *McKaig*, 4 Md., 450.)

"The right of the landlord to elect to continue the tenancy is not affected by the fact, that the tenant has refused to renew the lease, and has given notice that he has hired other premises. *It is not in the power of the tenant alone to throw off the character thus imposed upon him.*" (*Schuyler* vs. *Stone*, 51 N. Y., 309.)

"An action of trespass to try title can be maintained to recover possession of rents of real property from a tenant holding over after the expiration of his term." (*Lamb & Wynne* vs. *Beaumont, &c., Co.*, 2 Tex. Civ. App., 289; *S. P. Thurber & Co.* vs. *Conners*, 57 Tex., 96.)

As plainly appears from the record, the occupation by the plaintiff in error of the lands of the defendant in error was permissive. The plaintiff in error did not enter with the high hand, nor with any assertion, express or implied, of an adversary's right or title. On the contrary, he entered in the guise of one seeking to succeed to a tenancy which had just expired. In this relation he sought to purchase and professes to have purchased from the former tenant all those rights in permanent improvements which, as against the defendant in error, could only be acquired and used by one who was his tenant.

But if the plaintiff in error had entered on the lands of defendant in error not by consent, express or implied, but equally appropriating them in gross by daily aggression and encroachment, he could not then escape his just obligations. His exact contention has been adjudicated in the

case of *St. Louis Cattle Co.* vs. *Vaught*, 1 Texas Civil Appeals, 388. The Texas court uses this language:

"In this State, on account of the condition which has existed from time immemorial of the grazing lands, the owner of such property cannot complain as long as it remains a portion of the 'commons;' that the cattle of another should roam over it and graze upon it at will (*Davis* vs. *Davis*, 70 Tex., 123; *Buford* vs. *Houtz*, 133 U S., 320). This doctrine, however, does not authorize the owner of cattle *by affirmative conduct on his part* to appropriate the use of such lands to his own benefit. He will not be permitted thus to ignore the truth that every one is entitled to the exclusive enjoyment of his own property. In this case the appellant, by means of fences constructed or maintained, inclosed the land of appellee in such manner as to reap from it those benefits, which as a rule are incident exclusively to ownership. *The use and enjoyment of the property under such circumstances import necessarily the idea of liability.*"

1 Tex. Civ. App., 390.

In this case the two assignments of error filed by the appellant complain of the action of the court, in instructing the jury as shown by the third paragraph of its charge, and in refusing the special charge asked by the defendant. The third paragraph is as follows:

"If you find from the evidence that the defendant built and erected a fence completely inclosing a quantity of land, in which inclosure it embraced the survey sued for, and you find defendant is using the land sued for, in the same manner it is using the other part of such larger inclosure—for the grazing of cattle—then the defendant is in possession of said survey No. 23; and if you so find you will also find for plaintiff the value (if any) of the use and occupation of said survey No. 23 for the time said survey has been so embraced and used; not, however, giving the value of the *use and occupation* for a longer time than from May 4, 1887 [a date two years prior to the bringing of the suit], to the present time."

The special charge which was refused was as follows:

"If the defendant in inclosing its own land, which surrounded the land of plaintiff, necessarily inclosed the land of plaintiff, but made no claim of title to same, and placed none of its fences on plaintiff's land, and did not refuse plaintiff the use and occupation thereof, but offered him free access thereto, the plaintiff could not be allowed to recover rent."

The court of appeals adjudicate:

"The charge complained of involves the conclusions reached by us, and is therefore, in our opinion, proper. It hence follows, also, that the instruction requested was correctly refused." (*Id.*)

This adjudicates that if the plaintiff in error uses the Phelps land exactly as he uses the land leased from the State he is in possession of the Phelps land and should pay for using it, and that it is no defence for the plaintiff in error to say that he placed none of the fences on the land of the defendant in error, nor refused the latter the use and occupation thereof.

LEIGH ROBINSON,
For Defendant in Error.